[redacted]

(24,933)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 254.

ERIE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

HENRY M. STONE AND CLARK NOBLE, PARTNERS, DOING BUSINESS UNDER THE NAME OF STONE & NOBLE.

IN ERROR TO THE COURT OF APPEALS OF CRAWFORD COUNTY, STATE OF OHIO.

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1 In the Court of Appeals of Crawford County, O.

ERIE RAILROAD COMPANY, Plaintiff in Error,

vs.

HENRY M. STONE and CLARK NOBLE, Partners Doing Business Under the Name of Stone & Noble, Defendants in Error.

Petition of Plaintiff in Error for Allowance of Writ of Error from the Supreme Court of the United States to the Court of Appeals of Crawford County, State of Ohio.

To the Honorable Phil M. Crow, presiding Judge of the Court of Appeals of Crawford County, State of Ohio:

This petition of Erie Railroad Company respectfully shows as follows:

On the 13th day of April, 1907, a petition was filed in the Court of Common Pleas of Crawford County, Ohio, the defendants in error herein being Plaintiffs and the Plaintiff in Error herein being defendant.

Plaintiff's petition contained three causes of action.

Complaint is made now only as to the matters and things arising out of the second and third causes of action. In the second cause of action, the Defendants in Error claimed damages for a shipment of horses made on the 6th day of March 1907 from St. Marys in the State of Ohio, to Buffalo in the State of New York because said horses were not safely and expeditiously carried and
2 were not fed and watered enroute whereby the horses were injured as therein alleged.

In the third cause of action damages were claimed for a shipment of horses made on the 20th day of March, 1907, from St. Marys, Ohio to Buffalo, in the State of New York because certain horses were not safely and expeditiously carried whereby the horses were injured as therein alleged.

The answer of Erie Railroad Company for its first defense to each of the three causes of action was a general denial and a further averment that the second and third shipments were made under written contract and pleads the terms of the contract.

The third defense pleads specifically the written contract of shipment and pleads a failure to file claim for damages within five days or any other time arising on each of said causes of action.

There is an amendment to answer of Erie Railroad Company filed to the third defense to the second and third causes of action. Said amendment to the answer being as follows:

Defendant by way of amendment to its answer to the second and third causes of action says 'That each of said shipments came into this defendant's hands in Ohio for transportation by and from Ohio to East Buffalo, New York as a common carrier by Railroad; that its official tariffs, classifications and rules, applicable to such inter-

state shipment and in print and in force and open to public inspection, prior to and at and during the times of such shipments,
had been filed with and were at all times duly on file with
3 the interstate commerce commission of the United States,
pursuant to the act of *commerce* of the United States, approved Febry. 11, 1887, and entitled, "An Act to Regulate Commerce and pursuant to all Acts of Congress Amendatory thereof" and provided that live stock shipped under written contracts of the nature of those under which the shipments referred to in said second and third causes of action were made as in said second defense alleged, to be carried at specified reduced rates otherwise at specified higher rates; that if shipper should not give notice of his election not to accept such reduced rate, it would be understood that he desired the property carried subject to the conditions and provisions of such contract, in order to secure such reduced rates. That such shipments were in fact made at such reduced rates. That by virtue of the foregoing and of said Acts of Congress the provisions of said contract are each and all binding on plaintiffs and under the terms of said contract, plaintiffs are not entitled to recover herein on their second and third causes of action."

A reply was filed denying the allegations of the second defense and the amended defense. At the trial of the said case in the Court of Common Pleas of Crawford County contracts were admitted in evidence showing that they were signed by the Defendants in Error and the evidence showed that the Erie Railroad Company together with The Lake Erie & Western upon whose line the shipment was started from St. Marys, were at the time of the occurrences com-
plained of in plaintiff's petition, common carriers by rail-
4 roads engaged in Interstate Commerce between the several
states and that the horses so shipped were shipped in cars used by the Erie Railroad Company in Interstate Commerce and that the cars in which said horses were loaded were shipped from a point in the state of Ohio to a point in the State of New York and this proof was not contradicted.

At the close of the testimony of the Defendants in Error and again at the close of all the testimony the Erie Railroad Company moved the Court for a peremptory instruction to the jury for a verdict in its favor upon the theory that the relations between the Plaintiff and Defendant were governed by the Act of Congress approved Febry. 11, 1887, entitled "An Act to Regulate Commerce and Pursuant to all Acts of Congress Amendatory thereof," and that as the uncontradicted evidence of Plaintiffs established their signature to these contracts and their acquiescence in the terms thereof that the conditions contained in said contract became a solemn and binding obligation upon the part of the Defendants in Error and as a matter of law they had no right to recover. Both of these motions were overruled by the trial Court and exceptions preserved in each instance. The Court as shown by the Bill of Exception in overruling the motions and in excluding a certain portion of the evidence offered by the Defendants in Error in reply said: "The theory upon which I have admitted this testimony was that probably

during this talk something took place by which this requirement of the claim that the notice be presented in writing and sworn to, now this conversation does not amount to that nor tend in that direction at all but simply that he tells your agent that he
5 is going to sue the company and the agent says 'Go ahead and put in your claim' that does not tend in the least to throw your man off his guard as to what he should do as he is required to do by these contracts."

Thus the trial Court found that there was no evidence of a waiver in the case. The trial Court in his charge to the jury said, "The Plaintiffs claimed that they signed the contracts in question not knowing or being advised what they contained and without any opportunity of reading the same. They do not claim in their pleadings or in their evidence that they were misled or forced to sign them or that any misrepresentations, deceit or fraud was perpetrated on them to secure their signatures. They had long been in the business of shipping horses, they signed the contracts voluntarily, they procured the lower rate because they had signed them and if they signed them in a hurry or not caring what they contained, they assumed the risk of their own folly and can not be heard now to take advantage of it. I hold therefore that they are bound by the provisions of these contracts."

The Court thus found and so charged the jury that the contracts were proper; that they had been signed and that these parties had procured the lower rate by signing them but later on in the charge of the Court, the Court charged the jury that the reasonableness of the five day clause in which the Defendants in Error were required to present a claim to the agent at the station of destination of each shipment and sworn to, was a question for the jury and so instructed the jury that they were to pass upon the reasonableness of the five day limit in the clause in the contract. By so
6 doing the Court refused to apply to this case the Act of Congress of February 11, 1887 entitled "An Act to Regulate Commerce and all Acts of Congress Amendatory thereof" and deprived this Plaintiff in Error of the right to have its rights arising thereunder determined by said Acts of Congress and the Acts Amendatory thereto. The jury returned a verdict finding in favor of the Defendants in Error on both causes of action. A motion for a new trial was filed by the Erie Railroad Company and overruled, judgment entered on the verdict, to which an exception was preserved. To this judgment the Erie Railroad Company thereafter filed a petition in Error in the Court of Appeals of Crawford County, Ohio, in which petition in error amongst other things the Erie Railroad Company complained of error of the Court in charging the jury and in overruling its motion to direct a peremptory verdict in its favor and in deciding the case contrary to the provisions of the Act of Congress as herein set forth.

Said cause came on to be heard in the Court of Appeals of Crawford County, Ohio and was argued by counsel at the January Term 1915, and on the 21st day of April, 1915, said Court decided said cause but filed no opinion simply affirmed the judgment of the

Court of Common Pleas and by so doing held that the rights of the parties were governed by the laws of Ohio and not by the Act of Congress approved February 11, 1887 entitled an Act to Regulate Commerce and All Acts Amendatory thereto, in view of the uncontraverted evidence showing that the shipments complained of in the second and third causes of action were shipments in each instance from St. Marys in the State of Ohio to Buffalo in the

7 State of New York.

To this judgment in the Court of Appeals in Crawford County, Ohio, the Erie Railroad Company filed a motion in the Supreme Court of the State of Ohio asking that Court to require the Court of Appeals of Crawford County, Ohio, to certify its record to the Supreme Court on the ground as stated in the motion that it involved a question of public or great general interest but the Supreme Court of the State of Ohio overruled said motion and refused to require said Court of Appeals to certify up its record. Thereupon the Erie Railroad Company filed its petition in error in the Supreme Court of the State of Ohio and claiming to file the same by reason of the fact that it involved questions arising under the Constitution and laws of the United States to which petition in error, the Defendants in Error filed a motion asking that the petition in error be stricken from the files. Upon a hearing had on this motion, the Supreme Court on the second day of July, 1915, sustained said motion and ordered the petition in error stricken from the files. All of which was done. By Article 4, sections 1, 2, and 6 of the Constitution of the State of Ohio, it is provided among other things that the Court of Appeals shall have final jurisdiction in all cases unless a question of public or general interest is involved when the Supreme Court may direct any Court of Appeals to certify its record to the Supreme Court or except in cases involving questions arising under the Constitution of the United States and the laws enacted thereunder.

8 Your petitioner further says that by reason of the fact that the Supreme Court of the State of Ohio refused to require the Court of Appeals to certify its record to said Supreme Court of the State of Ohio and from the further reason that said Supreme Court of the State of Ohio, struck the petition in error of Erie Railroad Company from its files that therefore the judgment of the Court of Appeals of Crawford County, Ohio was and is a final judgment in the highest Court in the State of Ohio in which a decision in this action could or can be had, and that a federal question was made in said action as hereinbefore set forth and that said judgment of this honorable Court was repugnant to and in conflict with the laws of the United States and particularly the said Act of Congress approved February 11, 1887 and entitled "An Act to Regulate the Commerce and all Acts of Congress Amendatory thereof" and that a decision of said Federal question was necessary to the judgment rendered.

And your petitioner further represents that under and by the terms of said Act of Congress above referred to and amendments thereto, the question of the reasonableness of said five day clause in

said contracts of shipment was and is a question of law and not a question to be submitted to the jury.

Wherefore your petitioner presents herewith an exemplified transcript of the record of your honorable Court in said cause and prays that a writ of error to the said Supreme Court of the United States be allowed and that citation be granted and signed; that the bond herewith presented be approved and that upon compliance with the terms of statutes in such cases made and provided, said
9 bond and writ of error may operate as a supersedeas, that the errors complained of may be refused in the Supreme Court of the United States and the judgment aforesaid of this the Court of Appeals of Crawford County, Ohio, may be reversed.

ERIE RAILROAD COMPANY,
By C. E. McBRIDE AND
N. M. WOLFE,
Its Attorneys.

The writ of error as prayed for in the foregoing petition is hereby allowed this 23rd day of August, 1915, the writ of error to operate as a supersedeas and the bond for that purpose is fixed at the sum of $3,000.00.

Dated this twenty-third day of August, 1915.

PHIL M. CROW,
Presiding Judge of the Court of Appeals of Crawford County, O.

10 [Endorsed:] No. —. Erie R. R. Co., Pl'ff in Error, vs. Henry M. Stone and Clark Noble, Partners Doing Business under the Name of Stone & Noble, Def'ts in Error. Petition of Plaintiff in Error. McBride & Wolfe, Att'ys for Pl'ff in Error. Filed Aug 28, 1915. G. Goldsmith, Clerk Court of Appeals, Crawford Co.

11 In the Court of Appeals of Crawford County, O.

ERIE RAILROAD COMPANY, Plaintiff in Error,
vs.
HENRY M. STONE and CLARK NOBLE, Partners Doing Business under the Name of Stone & Noble, Defendants in Error.

Assignment of Errors for the Supreme Court of the United States.

Now comes the Plaintiff in Error and respectfully submits that in the record, proceedings, decision and final judgment of the Court of Appeals of Crawford County, Ohio, in the above entitled matter there is manifest error in this to wit:—

First. That the Court of Appeals erred in affirming the judgment of the Court of Common Pleas of Crawford County, Ohio, thereby depriving this Plaintiff in Error of rights, privileges and accom-odations secured to it by the Act of Congress approved Feby. 11, 1887 and entitled An Act to Regulate Commerce and Pursuant

to all Acts of Congress Amendatory thereto. Said Act being passed by virtue of power conferred upon and vested in Congress by Article 1, section 8, clause 3 of the Constitution of the United States, the benefit and protection of which said clause of the Constitution and said Act of Congress and Acts amendatory thereto were duly set up and specifically claimed in these proceedings and by said affirmance holding that said clause in the Constitution and said Act of Congress and Acts amendatory thereto did not govern the rights and remedies of the Plaintiff in Error, Erie Railroad Company with respect to the matters and things out of which this action arose to the exclusion of the statute of the state under which the judgment was
12 had, in as much as the record showed that Erie Railroad Company upon the alleged act and defaults on which the second and third causes of action were based and for which said alleged acts and defaults the judgment was rendered, was at the time of the injuries complained of by the Defendants in Error a common carrier by railroad engaged in commerce between the states.

Second. Said Court erred in holding that the Ohio Statutes giving a right of action and governing the rights of the parties were applicable to the matters and things upon which this action was based notwithstanding said Act of Congress of February 11, 1887 and the acts amendatory thereto, the benefit and protection of which were duly and specifically claimed.

Third. Said court erred in denying Plaintiff in Error, Erie Railroad Company the right, privilege and immunity of being governed in respect to said causes of action, of having its liability therefore determined solely by the provisions of said Act of Congress of February 11, 1887 and acts amendatory thereto and thus erred in denying said Plaintiff in Error rights, privileges and immunities granted to it by said Act of Congress and acts amendatory thereto, which said rights, privileges and immunities were duly set up and specifically claimed in these proceedings.

Fourth. The said Court of Appeals, Crawford County, Ohio, erred in affirming the judgment of the Court of Common Pleas of Crawford County, Ohio, thereby affirming the action of said Court in overruling the motion of Plaintiff in Error at the close of all the evidence for the direction of a verdict in its favor, although
12½ under the Act of Congress of February 11, 1887 and Acts Amendatory thereto entitled, An Act to Regulate Commerce and by reason of uncontradicted proof showing that the two shipments complained of were shipments made from different states and the uncontradicted proof showing that the Defendant in Error signed the contracts provided for in said Act of Congress of February 11, 1887, and further by reason of the fact that on the uncontradicted proof Plaintiff in Error was as a matter of law entitled to the direction of a verdict in its favor.

Fifth. Said Court therefore erred in rendering the final judgment which it rendered against the Plaintiff in Error and which is complained of in this case.

Wherefore, for these errors, appearing in the record said Erie Railroad Company, Plaintiff in Error, prays, that the judgment of

said Court of Appeals of Crawford County, Ohio, be reversed, set aside and held for naught and that judgment be rendered for Plaintiff in Error granting its rights under the constitution and statutes of the United States and Plaintiff in Error also prays for judgment for its costs.

C. E. McBRIDE &
N. M. WOLFE,
Atty's for Pl'ff in Error.

13 [Endorsed:] No —. Erie R. R. Co., Pl'ff in Error, vs. Henry M. Stone and Clark Noble, partners doing business under the name of Stone & Noble Def'ts in Error. Assignment of Errors for the Supreme Court of the United States. McBride & Wolfe Att'ys for Plff. in Error. Filed Aug. 28, 1915. G. Goldsmith, Clerk Court of Appeals, Crawford Co.

14 In the Court of Appeals of Crawford County, O.

ERIE RAILROAD COMPANY, Plaintiff in Error,
vs.
HENRY M. STONE and CLARK NOBLE, Partners Doing Business Under the Name of Stone & Noble, Defendants in Error.

Order Allowing Writ of Error to the Court of Appeals of Crawford County, O.

The above entitled matter came on to be heard upon the petition of Erie Railroad Company, Plaintiff in Error for a writ of error from the Supreme Court of the United States to the Court of Appeals of Crawford County, Ohio, and upon examination of the petition and the record in said matter, and desiring to give the petitioner an opportunity to present in the Supreme Court of the United States questions presented by the record in said matter, it is ordered that a writ of error be and is hereby allowed to this Court from the Supreme Court of the United States and that the bond presented by said petitioner be and the same is hereby approved.

PHIL M. CROW,
Presiding Judge of the Court of Appeals of Crawford County, O.

15 [Endorsed:] No. —. Erie Railroad Co., Pl'ff in Error, vs. Henry M. Stone and Clark Noble, etc., Deft's in Error. Order Allowing Writ of Error to the Court of Appeals of Crawford County, Ohio. McBride & Wolfe, Attys for Plff. in Error. Filed Aug. 28, 1915. G. Goldsmith, Clerk Court of Appeals, Crawford Co.

16 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Judges of the Court of Appeals of Crawford County, Ohio. Greeting:

Because in the record and proceedings as also in the rendition of a judgment of a plea which is in the Court of Appeals of Crawford County, Ohio, before you or some of you being the highest Court of law or equity of said state in which a decision could be heard in the said suit between Erie Railroad Company, Plaintiff in Error and Henry M. Stone and Clark Noble, partners doing business under the name of Stone & Noble, Defendants in Error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under United States and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under said state, on the ground of their being repugnant to the constitution, treaties or laws of the United States and the decision was in favor of their validity; or wherein was drawn in question the construction of a clause of the Constitution or a treaty or statute of or commission held under the United States, and the decision was against the title, right, privilege or exemption specially set up or claimed under such clause of said Constitution, treaty, statute or commission, a manifest error hath happened to the great damage of Erie Railroad Company as by its complaint appears, we, being willing that error if any hath been should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly,

17 you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States together with this writ, so that you may have the same at Washington on the 29 day of September, 1915, in the said Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid being inspected the said Court may give cause further to be done therein to correct that error what of right and according to the laws and Constitution of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of said Supreme Court of the United States this 11th day of August in the year of our Lord, one thousand nine hundred and fifteen.

[Seal of the District Court, Northern Dist. of Ohio.]

B. C. MILLER, Clerk,
Clerk of the District Court of the United States, Northern District of Ohio,
By R. C. DEAN, *Deputy.*

Allowed:

PHIL M. CROW,
Presiding Judge of the Court of Appeals of Crawford County, State of Ohio, said Court of Appeals being Court of Last Resort in said State.

18 [Endorsed:] No. —. Erie Railroad Co., Pl'ff in Error vs. Henry M. Stone and Clark M. Noble, partners, etc., Def't in Error. Writ of Error. McBride & Wolfe, Atty's for Pl'ff in Error. Court of Appeals, Crawford Co. Filed Aug. 28, 1915. G. Goldsmith, Clerk.

19 In the Supreme Court of the United States.

UNITED STATES OF AMERICA, *ss:*

Citation.

To Henry M. Stone and Clark Noble, partners doing business under the name of Stone & Noble:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington within thirty days from the date hereof, to-wit: Sept. 29, 1915, pursuant to a writ of error filed in the clerk's office of the Court of Appeals of Crawford County, Ohio, wherein Erie Railroad Company is Plaintiff in Error and you are Defendants in Error, to show cause, if any there be, why the judgment rendered against the said Plaintiff in Error in the said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Phil M. Crow, presiding Judge of the Court of Appeals of Crawford County, Ohio, this 28th day of August, in the year of our Lord, 1915.

PHIL M. CROW,
Presiding Judge of the Court of Appeals of Crawford County, O.

I hereby acknowledge receipt of copy of the above citation and accept service thereof this 28 day of August, 1915.

W. J. GEER,
Att'y for Defendants in Error.

20 [Endorsed:] No. —. Erie R. R. Co., Plaintiff in Error, vs. Henry M. Stone and Clark Noble, partners, etc. Citation. McBride & Wolf. Court of Appeals, Crawford Co. Filed Aug. 28, 1915. G. Goldsmith, Clerk.

21 In the Court of Appeals of Crawford County, O.

ERIE RAILROAD COMPANY, Plaintiff in Error,
vs.
HENRY M. STONE and CLARK NOBLE, Partners Doing Business Under the Name of Stone & Noble, Defendants in Error.

Bond on Writ of Error from the Supreme Court of the United States.

Know all men by these presents: That we, Erie Railroad Company as principal and American Surety Company of New York as surety, are held and firmly bound unto Henry M. Stone and Clark Noble, partners doing business under the name of Stone & Noble in the sum of $3,000.00 to be paid to the said Henry M. Stone and Clark Noble, their heirs, executors, administrators and assigns, to the payment of which, well and truly to be made, we bind ourselves, our successors and assigns jointly and severally by these presents.

Sealed with our seals and dated this 17th day of August, 1915.

Whereas the above named Erie Railroad Company has prosecuted a writ of error from the Supreme Court of the United States to reverse the judgment rendered in the above entitled action in the Court of Appeals of Crawford County, State of Ohio.

Now therefore, the condition of this obligation is such that if the above named Erie Railroad Company shall prosecute its
22 said writ of error to effect and answer all costs and damages if it shall fail to make good its plea then this agreement shall be void, otherwise to remain in full force and effect.

ERIE RAILROAD COMPANY,
By R. S. PARSONS, *General Manager.*

[Seal of American Surety Company of New York.]

AMERICAN SURETY COMPANY OF NEW YORK,
By HOWARD D. PRITCHARD,
Resident Vice-President.

EUGENE B. PIKE,
Resident Assistant Secretary.

Attest:

I hereby approve the foregoing bond and surety this 23rd day of August, 1915.

PHIL M. CROW
Presiding Judge of the Court of Appeals of Crawford County, O.

23 STATE OF NEW YORK,
County of New York, ss:

W. H. Riley being duly sworn, says: That he is an Assistant Secretary of the American Surety Company of New York; that said Company is a corporation duly created, existing and engaged in business as a surety company under and by virtue of the laws of the State of New York, and has duly complied with all the requirements of the laws of said State applicable to said Company, and is duly qualified to act as surety under such laws; that said Company has also duly complied with and is duly qualified to act as surety under the Act of Congress of August 13, 1894, entitled "An Act relative to recognizances, stipulations, bonds and undertakings and to allow certain corporations to be accepted as surety thereon," as amended; that the within is a true copy of the last statement of the assets and liabilities of said Company as rendered pursuant to section 4 of said Act of Congress; that said statement is true and that said American Surety Company of New York is worth more than $5,000,000 over and above all its debts and liabilities and such exemptions as may be allowed by law.

W. H. RILEY

Subscribed and sworn before me this 6th day of Aug., 1915.

[Seal W. H. Bennem, Notary Public, Nassau County, N. Y.]

W. H. BENNEM,
Notary Public, Nassau County.

Certificate filed in New York County.
My commission expires March 30, 1917.

American Surety Company of New York.

Incorporated April 14, 1884.

General Offices, 100 Broadway.

Financial Statement, June 30, 1915.

Resources.

Real Estate { Home Office Building and Land, unencumbered	$3,200,000.00		
Real Estate { N. Y. City Water Front, unencumbered	215,000.00	$3,415,000.00	
Real Estate { Appraised value by N. Y. Insurance Dept.			
Stocks and Bonds, Market Value, June 30, 1915		3,897,952.60	
Mortgage and Collateral Loans, Judgments and Decrees		115,414.74	
Cash in Banks and Offices		679,349.62	
Premiums in Course of Collection	$786,577.66		
Less amount 3 months or more old	330,311.02		
		456,266.64	
Accrued Interest and Rents		49,474.22	
Salvage Recoverable		223,025.02	
			$8,836,482.84

Liabilities.

Capital Stock	$5,000,000.00	
Surplus	802,630.25	
Reserve for Re-insurance	2,054,971.86	
Reserve for Contingent Claims	752,559.99	
Reserve for Expenses and Taxes	168,428.14	
Reinsurances and Accounts Payable, not due	22,299.55	
Premiums Paid in Advance	35,593.05	
		$8,836,482.84

Special Deposits, required by insurance laws of various States, not considered.

THIS PAGE BOUND

24 *Extract from the Record Book of the Board of Trustees of the American Surety Company of New York.*

The first meeting of the Board of Trustees of the American Surety Company of New York, after the annual Stockholders' meeting, was held at the office of the Company, No. 100 Broadway, New York City, on Tuesday, January 20, 1914, at eleven o'clock A. M.

"The Secretary read the report of the Nominating Committee as follows:

"To the Board of Trustees of the American Surety Company of New York:

"GENTLEMEN: The Committee appointed by the Executive Committee of this Company at their meeting held Tuesday, December 9, 1913, for the purpose of nominating * * * officers of the Company, * * * for the ensuing year and until their successors are elected, beg leave to report as follows:

"We nominate for

Place.	Resident vice-presidents.	Resident assistant secretaries.
Cleveland, Ohio.	G. A. Garretson. J. J. Sullivan. E. G. Tillotson. James R. Garfield. J. R. Nutt. M. Stanley-Brown. Howard D. Pritchard. H. C. Williams. George H. Olmsted. E. B. Greene.	M. Stanley-Brown. Howard D. Pritchard. H. C. Williams. Edw. F. Archer.

"Whereupon, it was resolved, that the Secretary be authorized to cast one ballot on behalf of the Trustees present, for the Members of the Executive Committee, Finance Committee, Committee on Accounts, Committee on Capital Box, Officers and Counsel, as recommended by the Nominating Committee for the ensuing year and until their successors are elected; which was done, and thereupon the aforementioned persons were declared to have been unanimously elected to their respective offices for the ensuing year and until their successors are elected.

"The following resolution was adopted:

"Resolved, that the Resident Vice Presidents be and they hereby are, and each of them is hereby, authorized and empowered to execute and to deliver and to attach the seal of the Company to any and all obligations for or on behalf of the Company, such obligations, however, to be attested in every instance by the Resident Assistant Secretary."

STATE OF NEW YORK,
County of New York, ss:

I, Jacob Pfeiffer, Assistant Secretary of the American Surety Company of New York, do hereby certify that I have compared the foregoing extracts and transcripts, from the Record Book of the Board of Trustees of the American Surety Company of New York, with the original record of said Board, and that the same are correct extracts and transcripts therefrom as they appear of record and are set forth and contained in said Record Book; and I further certify that I have compared the foregoing resolutions with the originals thereof, as recorded in the Minute Book of said Company, and do certify that the same is a correct and true transcript therefrom, and of the whole of said original resolutions; and that the said resolutions have not been revoked or rescinded.

Given under my hand and the seal of the Company, at the City of New York, this 5th day of February, 1914.

[Seal American Surety Company of New York.]

JACOB PFEIFFER,
Assistant Secretary.

25 [Endorsed:] No. —. Erie Railroad Co., Plaintiff in Error, vs. Henry M. Stone and Clark Noble, partners etc. Defendants in Error. Bond. McBride & Wolf, Att'ys for Pl'ff in Error. Court of Appeals, Crawford Co. Filed Aug. 28, 1915. G. Goldsmith, Clerk.

26 In the Court of Appeals, Crawford County, Ohio.

Erie Railroad Company, Plaintiff in Error,
vs.
HENRY M. STONE and CLARK NOBLE, Partners Doing Business Under the Firm-name of Stone & Noble, Defendants in Error.

Petition in Error.

Plaintiff in error says that at the January Term, 1914, of the Court of Common Pleas of Crawford County, Ohio, defendants recovered a judgment by the consideration of said Court against the Plaintiff in Error, in an action then pending therein wherein Defendants in Error were plaintiffs and Plaintiff in error was defendant.

A transcript of the docket and journal entries together with the original bill of Exceptions and original papers are filed herewith. There is error in the said record and proceedings in this, to-wit:

First. Said Court erred in overruling the motion of plaintiff in error for a new trial.

Second. The Verdict and judgment are against the weight of the evidence.

Third. The verdict and judgment are contrary to law.

Fourth. The Court erred in admitting evidence objected to by Erie Railroad Company.

Fifth. The Court erred in rejecting evidence offered by the Erie Railroad Company.

Sixth. The Court erred in its charge to the Jury.

Seventh. The Court erred in refusing to charge the jury as requested by the Erie Railroad Company.

Eighth. The damages given by the jury are excessive to such an extent as to appear to have been given under —.

Ninth. The Court erred in overruling the motion made by Erie Railroad Company at the close of plaintiff's testimony and renewed at the close of all the testimony.

Tenth. The Court erred in overruling the motion and demurrer of Erie Railroad Company to the reply of the defendant in error.

27 Eleventh. The Court of Common Pleas has no jurisdiction to hear this matter as the filing of the Amended Answer gives the Federal Court jurisdiction of this matter alone.

Twelfth. The said judgment was given for defendants in error when it ought to have been given for plaintiff in error.

Thirteenth. For other errors apparent upon the record.

Plaintiff in error therefor- prays that it may be restored to all things which it has lost by reason thereof.

McBRIDE AND WOLF,
Attorneys for Plaintiff in Error.

Service of summons in above entitled cause is waived and appearance of Defendants in error voluntarily entered this 24th day of April, 1914.

W. J. GEER,
Attorney for Defendants in Error.

28 *Transcript of the Docket & Journal Entries.*

Case No. 9204.

HENRY M. STONE and CLARK NOBLE, Partners Doing Business under the Firm Name of Stone and Noble,

vs.

THE LAKE ERIE & WESTERN RY. Co. and THE ERIE RAILROAD COMPANY.

Civil Action.

Petition Filed Apr. 13, 1907.
Precipe " " " "

L. C. Barker.
9204.
Finley & Gallinger.
J. W. Coulter.

1907, April	13th.	Summons issued.
" "	"	Summons returned endorsed—The State of Ohio, Crawford County, ss:—Received this writ April 13th, 1907, at 3:30 P. M. As commanded by this writ, I summoned the within named defendant, The Lake Erie and Western Railroad Company by handing a true and certified copy of this writ with all the endorsements thereon to C. E. Mayberry, Agent of the Lake Erie & Western Railroad Company, at New Washington, Ohio. I also served the Erie Railroad Company by handing a true and certified Copy of this writ with all the endorsements thereon to Frank Cook, Agent of the Erie Railroad Company at Galion, Ohio, August Gerhart, Sheriff by J. E. Myers, Dep.
" May	11th.	Motion of the Erie Railroad Company to make petition more definite and certain filed.
" "	"	Brief in support of Motion filed.
" "	13th.	Motion filed.
" "	17th.	Motion filed.
" June	3rd.	Summons returned endorsed—State of Ohio Crawford County, ss: Received this writ May 31st, A. D. 1907, at Nine o'clock, A. M. and as commanded by this writ, I served the within named defendant, The Lake Erie and Western Railroad Com-

pany by handing to Fail Fletcher, regular appointed Freight Agent for said — (not finding President or Secretary or other chief officer of said Company in my ba-li-wick) a true and certified copy of the said writ with all the endorsements thereon. H. Van Gunten, Sheriff, by C. R. Basler, Deputy.

" " 8th. Summons returned endorsed—State of Ohio Crawford County, ss: Received this writ 6/7-A. D. 1907 at nine o'clock A. M. and as commanded by this writ, I summoned the within named defendant, on the 7th day of June, 1907, served the Lake Erie and Western Railroad Company by handing to Cail Fletcher duly appointed Freight Agent *on* said Company (not finding President, Vice President or Secretary or other chief officers of said Company) a true and certified copy of this writ with all the endorsements thereon. H. Van Guten, Sheriff by C. W. Bailer, Deputy.

6-5-'07. Motion of defendant L. E. & W. Ry. Co., to *sit* aside and quash summons.

May 31st. Is sustained by agreement cause cont. 35/177.

29 7-6-'07. M. to petition sustained as to first and fourth grounds inclusive. Overruled as to fifth ground. Ex. Leave granted pl'ff to file petition by Aug. 15th, '07. Cause continued. 35.

1907, October 4th. Amended petition filed.

" " 5th. Summons returned endorsed State of Ohio Crawford County ss: Received this writ Oct. 4th, 1907, at 2 o'clock, P. M. As commanded, served the within named defendant by handing a true and certified copy of this writ with all the endorsements thereon to A. F. Luce, Agent, of the said L. E. & W. Ry. Co., at Chatfield, Ohio. August Gerhart, Sheriff, by J. E. Myers, Dep.

" " 17th. Motion filed.

" " " Brief filed.

" " 21st. Motion filed.

" " 22nd. Affidavit filed.

" November 21st. Affidavit filed.

" " " Motion filed.

" December 3rd. Precipe filed.

" " " Summons issued to Sheriff of Allen County, Ohio.

"	"	6th. Summons returned endorsed: State of Ohio, Allen County, ss: Received this writ December 4th, A. D. 1907, at 9 o'clock A. M. As commanded by this writ I summoned the within named defendant, Dec. 4th, 1907, served the Lake Erie and Western Ry. Co. by handing to Cail Fletcher, Regular Appointed Freight Agent of said Company (not being able to serve President, Vice President, Secretary or other chief officers of said Company) a true and certified copy of this writ with all the endorsements therein. H. Van Auten, Sheriff, by C. M. Bailer, Deputy.
		9-9-'07. Leave to plaintiff to plead instanter.
		10-3-'07. Motion to quash summons of date May 29th, 1907, and its service sustained.
		11-21-'07. Plaintiff Mo. for leave to Sheriff to Amend his return.
		11-22-'07. Mo. to quash service sustained. Ex. Mo. to quash Amended petition overruled. Ex. Defendant Erie Co. leave to plead by December 21st, 1907. Cont. 33/313.
"	"	19th. Answer of Erie Ry. Company to amended Petition filed.
"	"	28th. Motion to quash service of summons filed.
1908, January		16th. Motion filed.
"	"	18th. Affidavit filed.
"	March	17th. Journal Entry filed.
"	"	" Journal Entry filed.
"	"	19th. Substitute Summons filed.

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1908, March	19th. Substitute Summons returned endorsed:— State of Ohio, Crawford County, ss: Received this writ Dec. 4th, A. D. 1907, at nine o'clock A.M. As commanded by this writ I summoned the within named defendant, December 4th, 1907, served the Lake Erie & Western Railroad Company by handing to Carl Fletcher, regular appointed Agent of said Company, (not being able to serve the President, Vice President, Secretary or other chief officials, of said Company) a true and certified copy of this writ with all the endorsements thereon. Nan Auten, Sheriff, by W. C. Bailey, Deputy.

3-9-'08. Mo. to allow Sheriff to Amend his return sustained.
3-16-'08. Leave to pl'ff to substitute original summons. 35/383.
April 18th, 1908. Continued. 35/432.
" May 4th. Journal entry filed.
" " 14th. Answer filed.
" " 25th. Bill of Exceptions filed.
" " " Notice of filing Bill of Ex. handed to L. C. Barker.
" " " Notice of filing Bill of Ex. signed by L. C. Barker and filed.
" June 4th. Objections to Exceptions filed.
5-4-'08. M. to quash service overruled. Ex. Usual time for allowance of bill of Exceptions. 35/441.
W. C. Beer, Esq., was directed by the Court to take the testimony herein. 35/463. Aug. 15th, 1908, Cont. 35/528.
" November 7th. Reply filed.
1909, January 2nd. Motion, demurrer and motion filed.
" " " Brief filed.
Sept. 21st. Leave to plaintiff to reply by Sept. 26th, 1909. 36/24.
10-3-'08. Pl'ff has leave to plead by Oct. 5th. 36/31.
Oct. 10th, Leave to plead by Oct. 24th given def't.
Dec. 17th, Leave is given to plead to reply by Jan. 4, 36/36.
Dec. 18th, 1908. Continued. 36/112.
Journal Entry filed.
" February 24th. Feb. 20th, 1909. Motion & Demurrer to reply overruled. Ex. 36/168. March 30th, 1909, Continued. 36/223.
June 19th, 1909, Continued. 36/311.
December 31st, 1909, Continued. 36/483.
Reply to answer of S. E. & W. Ry. Co., filed.
1910, March 22nd. Motion filed.
" " 23rd. Motion filed.
" " " Supplemental reply to the Erie R. R. Co.'s Answer filed.
" " 24th.

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1910, March 24th. Verdict filed.
" " " Verdict for pl'ff against the L. E. & W. Co., for $1,669.70.
" " 26th. Motion for new trial filed.
2-14-'10. Taken out of the assignment at cost of Erie Railroad Company to this date. Judgment accordingly.

3-22-'10. Jury empaneled and sworn. Tuesday, March 22nd, 1910, at 1:20 o'clock P. M.

3-23-'10. Motion to require election by plaintiff filed by each defendant overruled. Each defendant severally excepts.

2-23-10. Motion to direct verdict in favor of defendant S. E. & W. Ry. Co., sustained. Pl'ff ex. Motion to direct verdict in favor of Erie Ry. Company overruled. Erie Ry. Company excepts.

3-24-10. 1:30 P. M. Cause submitted to the jury 4:45 P. M. Jury reported verdict against the Erie Ry. Co., for $1,669.70 in favor of plaintiffs. Verdict in favor of Lake Erie & Western Ry. Co. Leave to file amendment to reply to conform with proof.

4-22-'10. Motion for new trial overruled. Def't ex. Journal ordered kept open 40 days for preparation and allowance of Bill of Exceptions.

" May 20th. Journal Entry filed.
" " " Bill of Exceptions filed.
" " " Precipe for Docket & Journal Entries filed.
" " " Notice of filing Bill of Ex. handed to L. C. Barker, Att'y for Pl'f.
" " " Notice of filing Bill of Ex. signed by L. C. Barker, Att'y for Pl'f, and filed.
" July 6th. Stenographer's bill filed (W. C. Beer $4.00).
" October 17th Mandate filed.
" November 7th. Depositions filed.

Dec. 29th, 1910. Continued. 37/294.
May 5th, 1911. Continued. 37/471.
July 8th, 1911. Con-inued. 37/494.
January 8th, 1912. Continued. 38/187.
April 29th, 1912. Continued. 38/353.
August 27th, 1912. Continued. 38/478.
January 10th, 1913. Continued. 39/29.

2-11-'13. Taken out of assignment on application of the defendant, the Erie Ry. Company, and at its costs made at this term. Judgment accordingly.

May 10th, 1913. Continued. 39/227.

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1913, July 1st. Journal Entry filed. 39/88.
July 12th, 1913. Continued. 39/310.

1914, January 12th. Motion filed.
10-13-'13. Nov. 18th, heard. Jan. 14th, Continued. 39/558.

"	February	14th.	Motion filed.
"	"	16th.	Amendment to answer filed.
"	"	"	Demurrer filed.
"	"	17th.	Verdict filed.
"	"	20th.	Motion for a new trial filed.
"	April	1st.	Journal Entry filed.
"	"	9th.	Bill of Exceptions filed.
"	"	"	Notice of filing Bill of Ex. mailed to W. J. Geer, Pl'ff's Att'y.
"	March	31st.	Journal Entry filed.
"	April	18th.	Exceptions to Bill of Exceptions filed.
"	"	"	" " " " " " signed by W. J. Geer & filed.
"	"	"	Bill of Ex. Mailed to trial Judge W. F. Duncan, Findlay, O.
"	"	21st.	Bill of Ex. signed by trial Judge W. F. Duncan and filed.
"	"	"	Journal Entry filed.

33 Journal of the Court of Common Pleas, Crawford County, May Term, 1907, Twenty-third Day, June 15th, 1907.

STONE AND NOBLE
vs.
THE L. E. & W. RY. CO.

Civil Action.

This 15th day of June, 1907, this cause came on to be heard on the application of the defendant, The Lake Erie & Western Railway Company, to quash and set aside the summons for said defendant issued on May 31st, 1907, directed to the Sheriff of Allen County, Ohio, on consideration whereof with the consent of plaintiff said application is sustained and said summons and the return of the Sheriff of Allen County, thereon, are quashed and set aside.

September Term, 1907, Sept. 9th, 1907.

STONE AND NOBLE
vs.
THE L. E. & W. RY. CO.

Civil Action.

This cause hacing been heretofore submitted to the Court on the motion of the defendant, The Lake Erie & Western Ry. Company, to quash and set aside the return of service of summons in this case and taken under advisement, the Court now on this 9th day of September, 1907, being fully advised in the premises, do sustain

said motion and the return of service of summons upon the Lake Erie & Western Railroad Company is hereby quashed, set aside and held for naught, to all of which the said plaintiff excepts.

September Term, 1907, 9th day, Oct. 1st, 1907.

STONE & NOBLE
vs.
THE L. E. & W. RY. CO.

Civil Action.

This cause came on to be heard upon motion of plaintiff to dismiss said cause at his costs, the Court being fully advised in the premises doth sustain said motion. It is therefore adjudged that said above entitled cause be and the same is hereby dismissed at the cost of the plaintiff taxed at $—. No record.

O. K.
BARKER.

September Term, 1908, 14th day, Oct. 3, 1908.

STONE & NOBLE
vs.
THE L. E. & W. RY. CO.

Civil Action.

On motion plaintiff has leave to plead herein by Oct. 5th, 1908.

34 September Term, 1908, October 10th, 1908.

HENRY M. STONE et al.
vs.
THE L. E. & W. RY. CO.

Civil Action

On motion, leave is granted defendant to plead herein by Oct. 29th, 1908.

September Term, 1908, Dec. 17th, 1908.

HENRY M. STONE et al.
vs.
THE L. E. & W. R. R. CO.

Civil Action.

On motion leave is given defendant to plead to reply by Jan. 4th, 1909.

September Term, 1908, 52nd day, Dec. 18th, 1908.

HENRY M. STONE et al.
vs.
THE L. E. & W. R. R. Co.

Civil Action.

It is ordered that this case be and it is hereby continued.

January Term, 1909, Feb. 20th, 1909.

HENRY M. STONE et al.
vs.
THE L. E. & W. R. R. COMPANY.

Civil Action.

This day this cause came on for hearing upon the motion and demurrer of the Erie Railroad Company to the reply of plaintiff, and the Court being fully advised in the premises do overrule said motion and demurrer, to which ruling of the Court, the said defendant, The Erie Railroad Company by its counsel, did at the time except to the overruling of each separately.

O. K.
CUMMINGS, McBRIDE AND WOLFE.
BARKER.

January Term, 1909, March 30th, 1909.

HENRY M. STONE et al.
vs.
THE L. E. & W. R. R. COMPANY.

Civil Action.

It is ordered that this case be and it is hereby continued.

January Term, 1909, March 30th, 1909.

HENRY M. STONE et al.
vs.
THE L. E. & W. RY. Co.

Civil Action.

It is ordered that this case be and it is hereby continued.

35 September Term, 1909, Dec. 31st, 1909.

HENRY M. STONE et al.
vs.
THE L. E. & W. R. R. COMPANY.

Civil Action.

It is ordered that this case be and it is hereby continued.

January Term, 1910, March 22nd, 1910.

HENRY M. STONE et al.
vs.
THE L. E. & W. R. R. COMPANY.

Civil Action.

On this 22nd day of March, A. D. 1910, this cause came on for hearing upon the motion of plaintiff for leave to reply to the answer of the Lake Erie & Western Railway Company, which motion is hereby granted; and, thereupon, upon the date last aforesaid came the parties herein, by their Attorneys, also came the following named persons, as jurors, to-wit: Emanuel Leonhar, Guy Hamlin, Jacob Felick, Emanuel Pfleiderer, George Mollencop, Peter Heydinger, Albert Nungesser, Thomas Ulmer, Wm. Munz, Jonas Crall, George Meyers, and E. E. Class who were duly empaneled and sworn according to law; and thereupon this case came on for hearing on the pleadings and the evidence, and said jury was cautioned and discharged until the coming in of Court tomorrow morning.

O. K.
CUMMINGS, McBRIDE AND WOLFE,
Attorneys for Defendants.

O. K.
L. C. BARKER,
Attorney for Plaintiff.

January Term, 1910, March 23rd, 1910.

HENRY M. STONE et al.
vs.
THE L. E. & W. R. R. COMPANY.

Civil Action.

This 23rd day of March, again came the said parties, by their Attorneys, also came the jury heretofore impaneled and sworn, and the trial proceeded, and the said jury having heard all the evidence

adduced on the part of the plaintiffs, and said plaintiffs having rested, each of said defendants offered a separate motion praying for an order requiring plaintiffs to elect against which of said defendants, they, the said plaintiffs, would seek their redress *upon the* motions the Court does hereby overrule, to which ruling of the Court the said defendants severally excepted in so far as said ruling affected their respective motions; and thereupon defendant, The Erie Railroad Company, moved the Court to direct a verdict in favor of the Erie Railroad Company which motion is overruled, and to which ruling of the Court said defendant, The Erie Railroad Compan*t*, doth except; and thereupon, the defendant the Lake Erie & Western Railroad Company moved the Court for an order directing a verdict in favor of the said The Lake Erie and Western
36 Railroad Company which motion the Court doth here sustain, to which ruling the plaintiff doth except and to which ruling the Erie Railroad Company also excepts, and thereupon the trial proceeded and the said jury having heard additional testimony were duly cautioned and charged until the coming-in of Court tomorrow morning.

O. K.
CUMMINGS, McBRIDE & WOLFE,
Atty's for Defendant.

O. K.
L. C. BARKER,
Att'y for Plaintiff.

January Term, 1910, March 24th, 1910.

STONE & NOBLE
vs.
THE L. E. & W. R. R. COMPANY.

Civil Action.

This 24th day of March, A. D. 1910, again came the said parties, plaintiffs Stone & Noble, and the Erie Railroad Company by their attorneys, also came the jury heretofore empaneled and sworn, and thereupon plaintiff moved the Court for an order granting leave to file a supplemental reply to the Erie Railroad Company's Answer instanter, which motion is by the Court sustained and leave is granted as prayed for, to which ruling and leave the Erie Railroad Company excepts. And at the close of all of the evidence the Erie Railroad Company again — its motion to direct a verdict in its favor which motion was overruled to which ruling the Erie Railroad Company excepts, and the said jury having heard all the evidence adduced, the arguments and charge of the Court, retired to their room in charge of the Sheriff for deliberation.

And now comes the said jury into open Court with their verdict in writing against the Erie Railroad Company, signed by their fore-

man and say: "We, the jury in this case, being duly empaneled and sworn, after hearing the evidence argument of counsel, and charge of the Court, do, upon our oaths aforesaid, find the issues joined for the plaintiff, and against the defendant, Erie Railroad Company, and assess their damages against said Erie Railroad Company, at $1415.00 with interest at six per cent per full amount $1669.70. Thomas Ulmer, Foreman, also their verdict in writing in favor of the Lake Erie and Western Railroad Company, signed by their foreman, and say: "We the jury in this case, being duly empaneled and sworn, after hearing the evidence, argument of counsel, and charge of the Court, do upon our oaths aforesaid find the issues joined for the Defendant the Lake Erie and Western Railroad Company. Thomas Ulmer, Foreman.

And thereupon the defendant, The Erie Railroad Company, gave notice of motion for a new trial.

O. K.
CUMMINGS, McBRIDE AND WOLFE,
Att'ys for Defendant.

O. K.
L. C. BARKER,
Att'y for Plaintiff.

37 & 38 January Term, 1910, April 22nd, 1910.

STONE AND NOBLE
vs.
THE L. E. & W. R. R. COMPANY.

Civil Action.

This cause came on to be heard on the motion of the defendant, The Erie Ry. Company, for a new trial of this case, and was argued by counsel on consideration whereof the Court overruled said motion, to which ruling said The Erie Railroad Company excepts. It is therefore considered by the Court that the plaintiff recover of the defendant the Erie Railroad Company the sum of Sixteen hundred and sixty-nine and 70/100 dollars, heretofore found due plaintiffs and also plaintiffs' costs in and about this suit expended, taxed at $—, and that defendant pay its own costs, for all of which judgments execution is awarded. To which rulings of the Court, in this entry set forth, The defendant, the Erie Railroad Company doth except. It is further ordered that the journal be kept open for a period of 40 days after the date of this motion for the entering of the allowance of a bill of exceptions.

O. K.
CUMMINGS, McBRIDE AND WOLFE.

O. K.
L. C. BARKER.

October Term, 1910, 39th day, December 29th, 1910.

STONE & NOBLE
vs.
THE L. E. & W. R. R. COMPANY.

Civil Action.

It is ordered that this case be and it is hereby continued.

January Term, 1911, 57th day, May 5th, 1911.

STONE & NOBLE
vs.
THE L. E. & W. R. R. COMPANY.

Civil Action.

It is ordered that this case be and it is hereby continued.

May Term, 1911, 1st day, May 16th, 1911.

STONE AND NOBLE
vs.
THE L. E. & W. R. R. COMPANY.

Civil Action.

It is ordered that this case be and it is hereby continued.

39 *Mandate from Circuit Court.*

In Error.

Judgment reversed and cause remanded.

THE STATE OF OHIO:

Circuit Court of Crawford County, September Term, A. D. 1910.

At a term of the Circuit Court within and for the County of Crawford in the state of Ohio, begun and held at Bucyrus, on the 30th day of September, A. D. 1910, before Hon. Silas E. Hurin, Presiding Judge, and Hon. M. Donnelly and Hon. W. H. Kinder, Judges, among other proceedings then and there had by and before said Court, as appears by its Journal, is the following, towit:

ERIE RAILROAD COMPANY, Plaintiff in Error,
versus
STONE AND NOBLE, Defendants in Error.

The said parties by their Attorneys appeared and this cause came on to be heard upon the petition in error, of the said Erie Railroad Company, Plaintiff in error, together with the original papers and pleadings and a duly certified transcript of the orders and judgments of the Court of Common Pleas of Crawford County, Ohio, filed therewith in the said action wherein the Erie Railroad Company, plaintiff and Stone and Noble, Defendants, mentioned and referred to in said petition in error, and was argued by counsel: upon consideration whereof the Court find that in the record and proceedings aforesaid there is error manifest upon the face of the record *in* the prejudice of the plaintiff in error, in this, towit:

On this 27th day of September, A. D. 1910, this cause being called for hearing, request is made by defendant in error for a continuance of this cause that a diminution of the record may be had; and, it is agreed, by the parties hereto that the record shall be, by the Clerk of this Court of Common Pleas of said County corrected so that the same shall show the filing of an Amended Reply in this cause in Common Pleas Court as of the date of the trial of the same in said Court.

And said diminution of the record being had, this cause now comes on to be heard upon the petition in error together with the original papers and pleadings and a duly certified transcript of the orders and judgment of the Court of Common Pleas of Crawford County, Ohio, filed herewith in the said action wherein the said Stone and Noble, was plaintiff and the said Erie Railroad Company was defendant and was argued by counsel. Upon consideration thereof the Court finds in the record and proceedings aforesaid that there was error manifest upon the face of said record to the prejudice of the plaintiff in error, in this, towit; that the remarks of the defendants in error's counsel to the jury, as the same appear set out in the bill of exceptions and objected to by plaintiff in error *and* improperly and manifestly prejudicial to plaintiff in error's rights and interests.

It is therefore considered, adjudged and ordered by this Court that the judgment and proceedings of said Court of Common Pleas, in said action in favor of said defendant in error and against said plaintiff in error be — the same is hereby reversed — set aside and the plaintiff in error be restored to all things which it lost by reason of said judgment.

That the said action be and it is hereby remanded to said Court of Common Pleas of Crawford County, Ohio, to be proceeded in accordance with law and the rights of the parties. That the defendants in error pay the costs of this proceeding in error to be taxed and that a special mandate be sent to the Court of Common Pleas, to carry this judgment and order into execution.

To all of which orders, judgments and decree the defendant- in error at the time excepted.

Approved.

L. C. BARKER,
Att'y for Defendant- in Error.
CUMMINGS, McBRIDE AND WOLFE,
Attorneys for Plaintiff in Error.

It is therefore considered ordered and adjudged by this Court, that the judgment and proceedings of the said Court of Common Pleas, in said action in favor of the said defendants in error and against the said plaintiffs in error, be and the same hereby are, set aside, reversed, and held for naught, and that the said plaintiff in error be restored to all things which it has lost by occasion of the said judgment.

That this action be, and it hereby is, remanded to said Court of Common Pleas, of Crawford County, Ohio, to be proceeded in accordance with law, and the rights of said parties.

That the defendant in error pay the costs of this proceeding in error, to be taxed, and in default thereof that an execution be issued therefor, and that a special mandate and writ of procedendo be sent to the Court of Common Pleas to carry this judgment and order for costs into execution.

I, J. E. Myers, Clerk of the Circuit Court of Crawford County, do hereby certify that the foregoing Entry is truly taken and correctly copied from the journal of said Circuit Court.

Witness my hand and the seal of said Court at Bucyrus, Ohio, this 17th day of October, A. D. 1910.

J. E. MYERS, *Clerk,*
By EMMET C. CRALL, *Deputy.*

THE STATE OF OHIO:

Circuit Court of Crawford County.

To the Honorable Court of Common Pleas within and for the County of Crawford, Ohio, Greetings:

We do hereby command you, that you proceed, without
41 delay, to carry, the within and foregoing judgment of our Circuit Court of Crawford County, in the case of the Erie Railroad Company versus Stone and Noble, into execution, and to proceed to final judgment between said parties, according to law, the petition in error herein and heretofore filed, to the contrary notwithstanding.

Witness my signature as Clerk of our said Circuit Court, and the seal thereof at Bucyrus, Ohio, this 17th day of October, A. D. 1910.

J. E. MYERS, *Clerk,*
By E. C. CRALL, *Deputy.*

October Term, 1912, 49th day, Jan 8th, 1912.

STONE AND NOBLE
vs.
THE L. E. & W. R. R. COMPANY.

Civil Action.

It is ordered that this case be and it hereby is continued.

January Term, 1912 54th day, April 29th, 1912.

STONE & NOBLE
vs.
THE L. E. & W. R. R. COMPANY.

Civil Action.

It is ordered that this case be and it is hereby continued.

May Term, 1912, 35th day, August 22nd, 1912.

STONE AND NOBLE
vs.
THE L. E. & W. R. R. Co.

Civil Action.

It is ordered that this case be and it is hereby continued.

October Term, 1912, 42nd day, Jan. 10th, 1913.

STONE AND NOBLE
vs.
THE L. E. & W. R. R. Co.

Civil Action.

It is ordered that this case be and it is hereby continued.

January Term, 1913, 62nd day, May 10th, 1913.

STONE AND NOBLE
vs.
THE LAKE ERIE & W. R. R. Co.

Civil Action.

It is ordered that this case be and it is hereby continued.

42 January Term, 1913, 11th day, Feb. 11th, 1913.

STONE AND NOBLE
vs.
THE L. E. & W. R. R. Co.

Civil Action.

This 11th day of February, 1913, this cause came on to be heard and was argued by counsel and submitted to the Court. Thereupon on application of the defendant The Erie Railroad Company, this cause was taken out of the assignment at its costs made this term. Judgment accordingly.

O. K.
DANIEL BABST, *Judge.*

May Term, 1913, 21st day, July 12th, 1913.

STONE AND NOBLE
vs.
THE L. E. & W. R. R. Co.

Civil Action.

It is ordered that this case be and it is hereby continued.

October Term, 1913, Jan 15th, 1914.

STONE AND NOBLE
vs.
THE L. E. & W. R. R. Co.

Civil Action.

It is ordered that this case be and it hereby is continued.

Tuesday, February 3rd, 1914.

STONE AND NOBLE
vs.
THE L. E. & W. R. R. Co.

This cause coming on to be heard on the application of Henry Knote, as Trustee in Bankruptcy of Clerk Noble, to be made party to the above suit, the Court overruled said motion, to which the said Henry Knote as such Trustee excepted.

Monday, February 16th, 1914.

STONE AND NOBLE
VS.
THE L. E. & W. R. R. Co.

Defendant, The Erie Railroad Company is given leave to file amended answer instanter, this 16th day of February, 1914, to which order the plaintiff excepts. The plaintiff is given leave to file its demurrer to said amendment to answer, instanter, and said amendment being filed and the demurrer thereto being filed and heard this 16th day of February, 1914, and by Court overruled, to which findings and orders of the Court, the plaintiff excepts. Plaintiff is given leave to reply instanttr.

O. K.
W. J. GEER.
FRANK PIGMAN.

43 January Term, 1914, Feb. 16th, 1914.

STONE AND NOBLE
VS.
THE L. E. & W. R. R. Co.

This day came the parties herein by their Attorneys also came the following named persons as jurors, towit: William Auck, Henry Bauer, John Menninger, L. F. Dinkel, C. B. Chance, Charles Hilborn, Ed. Deisler, Frank Nungesser, John Fisher, Alexandria Flickinger, Geo. M. Elder, and Julius Eise, who were duly empaneled and sworn according to law, and thereupon the case came on for hearing on the pleadings and the evidence.

And the jury having heard the testimony adduced in part, and the hour of adjournment having been arrived, the Court discharged said jury until tomorrow morning at nine o'clock.

January Term, 1914, Feb. 17th, 1914.

STONE AND NOBLE
VS.
THE L. E. & W. R. R. Co.

This day again came the said parties by their attorneys; also came the jury heretofore empaneled and sworn and the trial proceeded. And the Court having heard the remaining testimony, and the hour of adjournment having arrived, the Court discharged the jury until tomorrow morning at nine o'clock.

January Term, 1914, Feb. 18th, 1914.

STONE AND NOBLE
vs.
THE L. E. & W. R. R. Co.

This day again came the said parties by their attorneys, also came the jury heretofore empaneled and sworn, and the trial proceeded. And the jury having heard the charge of the Court, said charge of the Court being given upon the request of the defendant before argument, and the argument of Counsel, and being further instructed as to the forms of verdict, retired, and upon consideration do, on this 18th day of February, 1914, report their findings and verdict in open Court, which verdict and finding is as follows:

"FEBRUARY 18th, 1914.

We, the jury in this case, being duly empaneled and sworn, after hearing the evidence, argument of counsel, and charge of the Court, do, upon our oaths aforesaid, find the issues joined for the plaintiffs and assess their damages against the defendant, Erie Railroad Company, at $1433.23. (Fourteen hundred and twenty-*two* and 23/100 dollars).

JOHN MENNINGER, *Foreman.*"

And upon their return of said verdict into open Court
44 the same was read by the Clerk of the said Court, and upon inquiry of the jury, same was stated to be their verdict. Thereupon after the return of said verdict by the Jury, and the reading as aforesaid, the said jury was then discharged by the Court, from the further consideration of said case.

January Term, 1914, March 23rd, 1914.

STONE AND NOBLE
vs.
THE L. E. & W. R. R. Co.

At the January Term of this Court on the 23rd day of March, A. D. 1914, this cause came on to be heard upon the motion of the defendant, The Erie Railroad Company, to set aside the verdict of the jury heretofore rendered in said cause, and for a new trial thereof, and the Court being fully advised in the premises finds that said motion is not well taken, and therefore overrules the same, which the said defendant excepts.

It is therefore considered by this Court, Judge Duncan, Presiding, that said plaintiff recover of said defendant, The Erie Railroad Company, the said sum of $1422.23 with interest from the first day of this term, and also their costs of this suit. Judgment against said

Erie Railroad Company for said amount with costs, to which the defendant excepts.

O. K.
McBRIDE AND WOLFE.

STATE OF OHIO,
Crawford County, ss:

I, G. Goldsmith, Clerk of the Court of Common Pleas, within and for said County, and in whose custody the files, journals and record of the said Court, are required by the laws of the state of Ohio to be kept, hereby certify that the foregoing is taken and copied from the original Docket and Journal Entries, and that said foregoing copy has been compared by me with the original Docket and Journal Entries, and that the same is a correct transcript thereof.

In testimony whereof, I do hereby subscribe my name officially and affix the seal of said Court, at the Court House in Bucyrus, in said County, this 28th of April, A. D. 1914.

[SEAL.]

G. GOLDSMITH,
Clerk of Courts,
By EDITH FORREST, *Deputy.*

45 In the Court of Common Pleas, Crawford County, Ohio.

HENRY M. STONE and CLARK NOBLE, Partners Doing Business Under the Firm-name of Stone and Noble, Plaintiffs,
versus
THE LAKE ERIE & WESTERN RAILROAD COMPANY and THE ERIE RAILROAD COMPANY, Defendants.

Amended Petition.

Plaintiff is a partnership formed for the purpose of, and carrying on the business of buying and selling horses.

Defendant, the Lake Erie and Western Railroad Company, is a corporation, duly organized and incorporated under the laws of the state of Illinois, having its principal offices, at the City of Indianapolis, in the state of Indiana, and for more than a year last past, has operated and now is operating a line of railroad through the states of Illinois, Indiana, and Ohio, and from St. Marys, Auglaize County, Ohio, to Lima, Allen County, Ohio, and through the County of Crawford, Ohio.

Defendant, the Erie Railroad Company, is a corporation duly organized and incorporated under the laws of the State of New York, and for more than a year, last past, has operated a line of railroad through the States of Ohio, Pennsylvania, and New York, passing through Lima, Marion, Galion, Akron, and Martel in the State of Ohio, and to the City of Buffalo, in the State of New York.

First Cause of Action.

On the 10th day of October, A. D. 1906, defendants were common carriers of goods, freight, live-stock, etc., for hire between points heretofore designated and ever since said last mentioned date have been common carriers as aforesaid; that on said last mentioned date, plaintiffs delivered to defendants, and defendants received as such common carriers at St. Marys, in Auglaize County, Ohio, to carry and deliver to the plaintiffs' at Martel, Marion County, Ohio, sixteen horses, the property of plaintiffs of the value of $— and it thereby became defendants duty to carry said horses safely and without injury expeditiously and with reasonable care and attention, and deliver same as aforesaid.

46 But defendants did not safely and without injury, expeditiously and with care and attention so carry and deliver said horses; but wrongfully and negligently failed so to do, whereby one horse was severely maimed and jammed in the right foreleg and injured in the stifle joint and right leg; one black horse was crippled in its forelegs; one bay horse was injured so as to become lame; and all said sixteen horses were scarred and bruised, and rough by reason of such negligence, and lack of attention aforesaid; having been neither fed nor watered during all the entire period of thirty-six hours, defendants were transporting same. Whereupon plaintiffs sustained a loss in the sum of three hundred and fifteen dollars, which sum, together with interest from the 12th day of October, A. D. 1906, remains due and unpaid.

Second Cause of Action.

On the 6th day of March, A. D. 1907, defendants were common carriers of goods, freight, live-stock, etc., between the points first designated and ever since said last mentioned date, having been common carriers as aforesaid, that on said last mentioned day, plaintiffs delivered to defendants, and defendants received as such common carriers at St. Marys, Auglaize County, Ohio, to carry and deliver to plaintiffs at Buffalo, New York, twenty three horses, the property of plaintiffs, of the value of $—, and it thereby became defendants duty to so carry said horses, safely and without injury, expeditiously, and with reasonable care and attention, and deliver same as aforesaid.

But defendants did not safely and without injury, expeditiously, and with care and attention carry said horses from St. Marys, Ohio, to Buffalo, New York, and deliver same to plaintiffs, but wrongfully and negligently failed so to do, requiring eighty-five and one half hours to transport said horses as aforesaid, during which time the same were fed but about one hundred pounds of hay, at Meadville, Pennsylvania. By reason of all which said negligence, seven of said horses were lamed, bruised, and scarred, and the entire load was in a very gaunt, rough, bad, and unsalable condition, whereby plaintiffs sustained damage in the sum of three hundred and fifty dollars, which sum, together with interest from the 17th day of March, remains due and unpaid.

Third Cause of Action.

On the 20th day of March, A. D. 1907, defendants were common carriers of goods, freight, live-stock, etc., for hire between the points first hereinbefore designated, and ever since said last men-
47 tioned date, have been common carriers as aforesaid: that on said last mentioned day plaintiffs delivered to the defendants, and defendants received as such common carriers to St. Marys, Auglaize County, Ohio, to carry and deliver to plaintiffs at Buffalo, New York, twenty-two horses, the property of plaintiffs of the value of $— and it thereby became defendants duty to carry said horses safely and without injury, expeditiously and with reasonable care and attention, and deliver same to plaintiffs as aforesaid.

But defendants did not safely and without injury, expeditiously, and with care, and attention, carry and deliver said horses, but wrongfully and negligently failed so to do. Whereby one horse, valued at three hundred dollars, became sick and died; two horses were so badly damaged that they were sold to the account of the Erie Railroad Company, and all said horses, were scarred, bruised rough, and in a very unsalable condition, when arriving at the point of destination, by reason of all which said negligence and delay in transportation on the part of defendants, the plaintiffs sustained damage in the sum of seven hundred and fifty dollars, which sum, together with interest from the 23rd day of March, remains due and unpaid.

Wherefore, plaintiffs pray for a judgment in such sum as three hundred and fifteen dollars with interest from the 13th day of October, A. D. 1906, three hundred and fifty dollars with interest from the 17th day of March, A. D. 1907, and seven hundred and fifty dollars with interest from the 23rd day of March, A. D. 1907, will amount in the aggregate.

L. C. BARKER,
Plaintiff's Attorney.

THE STATE OF OHIO,
Crawford County, ss:

Clark Noble, being first duly sworn, says that he is a member of the firm of Stone & Noble, plaintiffs above named, and that he believes the facts and allegations made and stated in the foregoing pleading to be true.

CLARK NOBLE.

Sworn to before me and subscribed in my presence this 30th day of August, A. D. 1907.

[SEAL.]

L. C. BARKER,
Notary Public.

48 In the Court of Common Pleas, Crawford County, Ohio.

HENRY M. STONE and CLARK NOBLE, Partners Doing Business Under the Firm-name of Stone and Noble, Plaintiffs,
versus
THE LAKE ERIE & WESTERN RAILROAD COMPANY and ERIE RAILROAD COMPANY, Defendants.

Answer of Erie Railroad Company to Amended Petition.

Erie Railroad Compa[illegible]dant, styled in the amended petition "The Erie Railroad [illegible]pany," for answer to the amended petition herein says: It denies that it has operated a line of railroad passing through Lima, Ohio, and for want of knowledge denies that plaintiff is a partnership.

First Defense.

For defendant's first offense to the first, second and third causes of action, said defendant denies each and all the allegations thereof, part for want of knowledge, and the rest because it knows them to be untrue.

Second Defense.

Said defendant says with reference to each cause of action respectively, that if horses were delivered and received for carriage, as therein alleged, the same was done under, and pursuant to the terms of, a written contract, entered into between the shipper or shippers, acting personally or through a duly authorized agent, and The Lake Erie and Western Railroad Company, and signed by both (in entering into which contract said Lake Erie & Western Railroad Company was acting for itself, and on behalf of any connecting carrier or carriers) by the terms whereof it was mutually agreed that in consideration of a freight rate, which was the lower of two published tariff rates for such carriage of live stock, and was based upon the ecpress condition that any carrier thereof assumed liability to the extent only of an agreed valuation of not exceeding $100. for each horse, upon which valuation was based such lower tariff rate, and beyond which valuation no such carrier should be liable in any event, whether loss or damage shoulc occur by the *be*gligence of it or its employees, or otherwise, shippers having the option of making the shipment at a higher rate of freight, according to the official tariffs, classifications and rules of said Lake Erie & Western Railroad Company and such connecting carriers, voluntarily decided
to ship under the conditions of such contract at such reduced
49 rate of freight. And that such contract contained the
further conditions and provisions that no carrier should be liable for loss or damage not occurring on its own road, that shippers were at their own sole risk and expense to load and take care of, and to feed and water the stock whilst being transported, whether

delayed in transit or otherwise, and to unload the same, and that no carrier or connecting carrier was to be under any liability or duty with reference thereto, except in the actual transportation of the same; that a representative of shipper in charge of the stock be carried without additional charge; that no carrier or connecting carrier should be liable for, or on account of any injury sustained by the stock from crowding one upon another, by kicking, by heat or cold changes in weather, or for delay caused from causes beyond a carrier's control; that in the event of any unusual delay or detention of said live stock, caused by the negligence of any carrier or its employees, or otherwise, shipper agreed to accept as full compensation for all loss or damage sustained thereby the amount actually expended by him for the purchase of food and water for the stock while so detained; and that no claim or damages which might accrue to shipper under the contract should be allowed or paid by said Lake Erie & Western Railroad Company or be sued for in any court by shipper, unless a claim for such loss or damage should be made in writing, verified by the affidavit of shipper or his agent, and delivered to this defendant at its office at point of destination within five days from the time such stock should be removed from the car, and if any loss or damage occur-ed be liable, unless a claim should be made in like manner and delivered in like time to some proper officer or agent of its.

Defendant says with respect to each cause of action respectively that if horses were delivered and received for carriage, as therein alleged, any damage thereto from insufficiency of food, water or rest was due to the acts, requests or omissions of plaintiffs, or of their agents with respect thereto, and not to any act, omission or fault of this defendant, and that any delays in transit and any damages from such delays were due to causes beyond the control of this defendant, and that any damage otherwise than as aforesaid sustained by such horses was due either to their crowding one upon another, or kicking, or by changes in weather or heat or cold.

49½ Third Defense to Second & Third Causes of Action.

For their defense to first, second and third causes of action respectively this defendant says that if horses were delivered and received for carriage as therein alleged, the same was done under and pursuant to the terms of a written contract, as set forth in the second defense, all allegations whereof with reference thereto are here adopted as though herein repeated at length, and that no claim for loss or damage, in writing or otherwise, verified by affidavit or not was made or delivered to any agent or officer of this defendant, at destination or elsewhere, within five days from the time the horses were removed from the car, or at any other time.

Fourth Defense to Third Cause of Action.

This defendant says with reference to the third cause of action that if horses were delivered and received for carriage as therein

alleged, one Smith was jointly interested as owner and shipper and party to the contract under which the shipment was made and accepted, wherefore there is a defect of parties plaintiff as to such cause of action.

Fifth Defense.

This defendant says that there is a misjoinder of parties defendant in this, that defendant and its co-defendant are improperly joined as defendants; and that separate and several causes of action against it are improperly joined with separate and several causes of action against its co-defendant, not affecting both defendants.

J. W. COULTER AND
CUSHING & TIDDELL,
Attorneys for Erie Railroad Company.

STATE OF OHIO,
Cuyahoga County, ss:

H. O. Dunkle being duly sworn says that he is the general Superintendent of defendant, Erie Railroad Company, a corporation, and that the allegations of the foregoing answer are true as he believes.

H. O. DUNKLE.

Subscribed by the said H. O. Dunkle, in my presence and by him sworn to before me, this 16th day of December, 1907.

[SEAL.] F. A. LEISENHEIMER,
Notary Public.

50 In the Court of Common Pleas, Crawford County, Ohio.

HENRY M. STONE and CLARK NOBLE, Partners Doing Business Under the Firm-name of Stone & Noble, Plaintiffs,
vs.
THE LAKE ERIE & WESTERN RAILROAD COMPANY and THE ERIE RAILWAY COMPANY, Defendants.

Reply.

The plaintiff, for reply to the second defense of the answer of the defendant, Erie Railroad Company, says: It denies each and every allegation of said second defense.

For a second reply to said second defense, the plaintiff says:

If any such contract was entered into as those alleged in said second defense by any person assuming to act in behalf of the plaintiff, such person had no authority to enter into such contract in behalf of plaintiff, of all of which said defendant Erie Railroad Company, had full knowledge.

For a third reply to said second defense, plaintiff says:

Neither the plaintiff nor the person who delivered said horses to

said Lake Erie and Western Railroad Company for shipment had any knowledge or information of two published tariff rates for the carriage of live stock upon either the Lake Erie and western or the Erie Railroad, and plaintiffs deny that either of said railroad companies had two published tariff rates for the carriage of live stock;: said shipment- of said live stock were made in each case, as follows: the person having charge of the shipment of said horses caused the same to be brought to the Railroad freight station of the defendant Lake Erie & Western Railroad Company at St. Marys, and said person notified one Zerbe who was the freight agent of said Lake Erie & Western Railroad Company at St. Marys that he desired to ship said horses on the railroad of said defendant Lake Erie & Western Railroad Company to be carried to the destination alleged in the amended petition of the plaintiff, whereupon said Zerbe as agent of said Lake Erie & Western Railroad Company caused a stock car to be run upon the side track for the purpose of loading said horses and the same were loaded, and said stock cars were thereafter sealed by said agent of said railroad company and said cars of live stock then and thence forward were in the sole care and possession of said carriers for the purpose of transporting the same to
51 their destination, as alleged in the amended petition of the plaintiff. After said delivery of said horses to said defendant Lake Erie & Western Railroad Company, said person having charge of the shipment of said horses in behalf of the plaintiff went with said Zerbe to the freight office of said defendant Lake Erie & Western Railroad Company at St. Marys and paid the freight for the transportation of said horses from St. Marys to the point of destination, said agent of said railroad company then informing said person attending to said shipment what said freight chargess amounted to and the same were thereupon paid by said person to said freight agent, who thereupon handed said person having charge of said shipping of said horses a paper partly in print and partly in writing, and requested him to sign the same, which he immediately did, without reading the same and without the same being read to him. Said person notified said freight agent that he desired to ship said horses at the usual rate and nothing was said, either by said freight agent or the person who signed said paper, about any other freight rate than the one paid for the transportation of said horses. Said freight agent knew that the person who signed the paper did not read the same and that the same was not read to said person, and that said person had no opportunity of knowing the contents thereof before he signed the same.

For a fourth reply to said second defense, the plaintiff denies that the damage complained of was due to the acts, requests or omissions of plaintiff or of their agents with respect thereto, and further denies that any delays in transit and any damages from such delays were due to causes beyond the control of the defendant Erie Railroad Company, but plaintiff says that such damage resulted solely from the causes alleged in plaintiff's amended petition.

For a fifth reply to said second defense, the plaintiff says:

Said alleged contract was wholly without consideration and was, therefore, not binding upon the plaintiff.

For a sixth reply to said second defense, plaintiff says the same is against public policy, illegal and void.

For a reply to the third defense to second and third causes of action, the plaintiff adopts its several replies to the second defense of said answer and makes the same its reply to said third defense to second and third causes of action.

52 For a further reply to said third defense to second and third causes of action, the plaintiff denies each and every allegation thereof, except as is hereinbefore admitted to be true. For a reply to the fourth defense to the third cause of action, the plaintiff denies each and every allegation thereof.

For a reply to the fifth defense of said answer, the plaintiff denies each and every allegation therein contained.

STONE & NOBLE,
By L. C. BARKER,
Their Attorneys.

STATE OF OHIO,
Crawford County, ss:

Clark Noble, being *d*worn, says he is one of plaintiffs and the facts stated and allegations contained in the foregoing reply are true as he verily believes.

CLARK NOBLE.

Sworn to before me and subscribed in my presence this 17th day of November, A. D. 1908.

[SEAL.]

L. C. BARKER,
Notary Public, Crawford Co., O.

53 In the Court of Common Pleas, Crawford County, Ohio.

HENRY M. STONE, and CLARK NOBLE, Partners doing Business Under the Firm-name of Stone & Noble, Plaintiffs,

vs.

THE LAKE ERIE AND WESTERN RAILWAY COMPANY and the ERIE RAILROAD COMPANY, Defendants.

Supplemental Reply to The Erie Railroad Company's Answer.

Now comes the plaintiffs in the above entitled action, leave of Court first had, and files this their Supplemental Reply to the Answer of The Erie Railroad Company.

Plaintiffs still denying that any Limited Live Stock Liability Contract was entered into by and between the parties hereto covering the shipments mentioned in plaintiff's petition, for a seventh reply to The Erie Railroad Company's second Defense and for a further reply to the third defense of said Company to each of plaintiff's said three causes of action, says: that if the Court should

find any such contract to have been entered into, that then that portion of said contract, which provides "and that no claim for damages which might accrue to the shipper under this contract shall be allowed or paid by the said carrier, or sued for in any court by the said shipper unless a claim for said loss or damage shall be made in writing, verified by affidavit of the said shipper or his agent, and delivered to" (at point of destination) within five days from the time said stock is removed from said car or cars; and that if any damage or loss occurs upon the line of a connecting carrier, then such carrier shall not be liable unless a claim shall be made in like manner, and delivered in like time, to some proper officer or agent, of the carrier on whose line the loss or injury occurs," was by said carrier or connecting carrier waived or dispensed with and the plaintiffs were released from the operation of said stipulation.

L. C. BARKER,
Att'y for Plaintiffs.

54 STATE OF OHIO,
Crawford County, ss:

L. C. Barker being first duly sworn, deposes and says that he is attorney for the plaintiffs herein, that Noble is a non resident of the county and Stone is absent from the County of Crawford, and that the facts above stated are true, as he verily believes.

L. C. BARKER.

Sworn to before me and subscribed in my presence this 24th day of March, A. D., 1910.

[SEAL.] W. J. SCHWENCK, *N. P.*

55 In the Court of Common Pleas, Crawford County, Ohio.

STONE AND NOBLE, Plaintiff
vs.
ERIE RAILROAD COMPANY, Defendant.

Amendment to Answer.

Defendant by way of amendment to its answer to the third defense to the second and third causes of action says:—that each of said shipments came into this defendant's hands in Ohio, for transportation by and from Ohio to East Buffalo, N. Y., as a common carrier by railroad; that its official tariffs, classifications and rules applicable to such Interstate Shipment, and in print and in force and open to public inspection prior to and at and during the times of such shipments had been filed with and were at all such times duly on file with the Interstate Commerce Commission of the United States, pursuant to the Act of Congress of the United States approved February 11th, 1887, and entitled "An Act to Regulate Commerce" and pursuant to all Acts of Congress amendatory thereof; and pro-

vided that live stock shipped under written contracts of the nature of those under which the shipments referred to in said second and third causes of action, were made, as in said second defense alleged, would be carried at specified reduced rates, otherwise at specified higher rates; that if shipper should not give notice of his election not to accept such reduced rate, it would be understood that he desired the property carried subject to the conditions and provisions of such contracts, in order to secure such reduced rates. That such shipments were in fact made at such reduced rate. That by virtue of the foregoing and of said Acts of Congress, the provisions of said contracts are each and all binding on plaintiffs, and under the terms of said contracts plaintiffs are not entitled to recover herein on their second or their third cause of action.

Wherefore defendant prays as in its amended Answer.

McBRIDE & WOLF,
Attorneys for Defendant.

56 STATE OF OHIO,
Richland County, ss:

C. E. McBride, being first duly sworn, says that he is one of the Attorneys for defendant, a corporation, duly authorized and the facts herein stated are true as he verily believes.

C. E. McBRIDE.

Sworn to before me and subscribed in my presence this 13th day of February, 1914.

[SEAL.] W. J. BISSMAN,
Notary Public, Richland Co., O.

57 In the Court of Common Pleas, Crawford County, Ohio.

HENRY M. STONE and CLARK NOBLE, Partners Doing Business under the Firm Name of Stone & Noble, Plaintiffs,

vs.

THE ERIE RAILROAD COMPANY, Defendants.

Motion for New Trial.

The defendant moves the Court for an order granting a new trial in the above entitled cause for the following reasons, to-wit:

First. The damages given by the jury are so excessive as to appear to have been given under the influence of passion and prejudice.

Second. The verdict was contrary to law.

Third. The verdict is against the weight of the evidence.

Fourth. The Court erred in omitting evidence objected to by defendant.

Fifth. The Court erred in ruling out evidence offered by the defendant.

Sixth. The Court erred in its charge to the jury.

Seventh. The Court erred in overruling the motion made by the

defendant at the close of plaintiff's testimony and renewed at the close of all the testimony to direct a verdict in its favor in each of the three several causes of action.

Eighth. The Court erred in refusing to send to the jury several requests introduced by the defendant in evidence and requested by it to be *went* to the jury in their deliberations.

Ninth. The Verdict was given for the plaintiff when it should have been given for the defendant.

FRANK PIGMAN AND
McBRIDE AND WOLF,
Attorneys for Defendant.

58 In the Court of Appeals, Crawford County, Ohio.

THE ERIE RAILROAD COMPANY, Plaintiff in Error,
vs.
H. M. STONE and CLARK NOBLE, Partners Doing Business as Stone & Noble, Defendant- in Error.

Entry.

This cause came on to be heard upon the petition in error, bill of exceptions, original papers and pleadings and the transcript of the record in the Court of Common Pleas; was argued by counsel, and submitted to the Court; on consideration whereof the judgment of the Court of Common Pleas is affirmed, there being however, in the opinion of the Court, reasonable grounds for this proceeding in error, no penalty is assessed.

It is therefore considered that said defendants in error recover of said plaintiff in error their costs herein, for which judgment is rendered, and execution awarded.

It is ordered that a special mandate be sent to the Court of Common Pleas to carry this judgment into execution, to all of which judgments, orders, and findings of the Court said plaintiff in error excepts.

Approved.

McBRIDE AND WOLF,
For Pl'ff in Error.
W. J. GEER,
For Def'ts in Error.

59 (Filed May 19, 1915. Frank E. McKean, Clerk Supreme Court of Ohio.)

In the Supreme Court of Ohio.

ERIE RAILROAD COMPANY, Plaintiff in Error,
versus
STONE & NOBLE, Defendants in Error.

Motion to Certify Record.

Now comes the plaintiff in error, Erie Railroad Compa[illegible] and moves the Court for an order directing the Court of Appeals of Crawford County, Ohio, to certify its record in the above entitled cause for the reason that it is a case of public or great general interest. It becomes a question of great public or general interest in this way, the bar of the state do not know whether such question as is involved in this case is to be regarded as arising under the Constitution of the United States so as to entitle us to file a petition in error without leave, or whether on the contrary it is to be regarded as arising under U. S. Statute as distinguished from the United States Constitution so that it cannot be filed here without leave. The Case involves three shipments of stock from St. Marys, Ohio, two to Pittsburgh, Pa., and one to Marion, Ohio. The trial Court found that the bill of lading contained a clause for a five day limit in which to present claim for damages and also found that no claim of same was ever presented within the five days and find there was no waiver but submitted the reasonableness of the five day clause to the jury.

McBRIDE AND WOLFE,
Att'ys for Plaintiff in Error.

Service of a copy of said motion is this day, May 18th, 1915, received.

W. J. GREER,
Att'y for Defendants in Error.

60 (Filed June 10, 1915. Supreme Court of Ohio. Frank W. McKean, Clerk.)

In the Supreme Court of the State of Ohio.

ERIE RAILROAD COMPANY, Plaintiff in Error,
vs.
HENRY M. STONE and CLARK NOBLE, Partners Doing Business under the Firm Name of Clark & Noble, Defendants in Error.

Petition in Error.

Plaintiff in error says that this cause involves questions arising under the constitution of the United States as hereinafter appears

and therefore comes within the provisions of the constitution of the State of Ohio permitting this petition in error to be filed and it says that at the January Term of Court, 1915, of the Court of Appeals of Crawford County, Ohio, and by the consideration of said Court, the defendant in error recovered a judgment against the plaintiff in error in a suit therein pending wherein plaintiff in error was plaintiff in error and defendant in error was defendant in error.

A certified copy of said judgment and the record and proceedings of said Court together with the original papers and bill of exceptions are filed herewith and the plaintiff in error avers that there is manifest error in the following particulars, to-wit:

First. The question involved in this cause involves that part of the constitution of the United States relating to commerce between the States.

Second. There was an issue of facts joined by the pleadings in the cause involving the provisions of an Act of Congress of the United States approved February 11, 1887 and entitled "An Act to Regulate Commerce and pursuant to all Acts of Congress Amendatory Thereof." But the Court in its instruction to the jury and in refusing to withdraw said cause from the jury disregarded said portion of the Constitution of the United States relating to the commerce between the States and also refused to submit said cause to the jury in accordance with the Act to Regulate Commerce.

Third. That the shipments made in the second and third causes of action set forth in the petition of Plaintiffs below were each and all made under and by virtue of the provisions of the Constitution of the United States relating to commerce between the states and that the provisions of said acts are each and all binding on the defendants in error and under the terms of said Acts as defined
61 by said Acts of Congress, the defendants in error were not entitled to recover on their second and third causes of action.

Fourth. That the official tariffs, classifications and rules applicable to such interstate shipment and in print and in force and open to public inspection prior to and during the times of such shipments had been filed with and were at all such times duly on file with the Interstate Commerce Commission of the United States and as such fully and completely determined the rights of the parties in this litigation as the shipments in the second and third causes of action were Interstate Shipments being shipments from St. Marys, Ohio, to Buffalo, N. Y., and said Court should have followed said Acts of Congress and not disregarded the same.

McBRIDE & WOLFE,
Att'ys for Plaintiff in Error.

Service of summons is waived and appearance of the defendant in error is entered this 8th day of June, 1915.

W. J. GEER,
Per H.,
Att'y for Defendants in Error.

62 (Filed June 18, 1915. Frank E. McKean, Clerk Supreme Court of Ohio.)

In the Supreme Court of the State of Ohio.

THE ERIE RAILROAD COMPANY, a Corporation, Plaintiff in Error,
vs.
H. M. STONE and CLARK NOBLE, Partners Doing Business as Stone and Noble, Defendants in Error.

Motion.

Now comes the defendants in error for this purpose and no other, and file this, their motion to strike the petition in error from the files, for the following reasons, towit:

1st. That this Supreme Court of Ohio denies the motion of said plaintiff in error to have the record of the Court of Appeals certified to it, and held that the plaintiff in error had no right to file a petition in error, in this case, and thereby refused the application of said plaintiff in error, to have the case reviewed by this Honorable Court.

2nd. That said Case was tried in the Court of Common Pleas, and there was no issue raised or tendered involving the questions arising under the Constitution of the United States or of this State.

3rd. That said plaintiff in error has heretofore by this Court, towit:—on June 4, 1915, been denied the right to file a petition in error in this case.

4th. That this cause is not one that comes within the exceptions as provided in Article IV, section 16, of the Constitution of the State of Ohio.

STONE AND NOBLE,
Defendants in Error,
By Their Att'y, W. J. GEER.

The undersigned — plaintiff in error acknowledge service of the above motion, this 14th day of June, 1915.

McBRIDE AND WOLFE.

63 Supreme Court of Ohio.

STATE OF OHIO,
City of Columbus, ss:

I, Frank E. McKean, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing are true and correct copies of the motion for an order directing the Court of Appeals of Crawford County to certify its record, Petition in Error, and Motion to dismiss Petition in Error, filed in Cause No. 14913 Erie Railroad Company, Plaintiff in Error, Versus Stone and Noble, Defendants in Error, in said Court.

In witness whereof, I have hereunto subscribed my name and affixed the seal of said Court this 9th day of August, A. D. 1915.

[SEAL.] FRANK E. McKEAN,
Clerk Supreme Court of Ohio,
By SEBA H. MILLER, *Deputy.*

64 Supreme Court of Ohio, January Term, 1915, Friday, 4th day of June, A. D. 1915.

ERIE RAILROAD COMPANY
vs.
STONE AND NOBLE.

Motion for an Order Directing the Court of Appeals of Crawford County to Certify Its Record.

It is ordered by the Court that this motion be and the same hereby is overruled.

Journal 27, page 121.

Supreme Court of Ohio, January Term, 1915, Friday, 2nd day of July, A. D. 1915.

ERIE RAILROAD COMPANY
vs.
STONE AND NOBLE.

Motion by Defendants to Dismiss Petition in Error in Cause No. 14913 *on the General Docket.*

It is ordered by the Court that this motion be, and the same hereby is allowed; and that the petition in error herein be, and the same hereby is, dismissed.

It is further ordered that the defendants in error recover from the plaintiff in error their costs herein expended taxed at $—. Journal 27 page 143.

I, Frank McKean, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing are true and correct copies of the Journal entries in case *Bo.* 14913 Erie Railroad Company, Plaintiff in Error, Versus Stone & Noble, Defendants in error, as appears by the Records of said Court.

In witness whereof, I have hereunto subscribed my name and affixed the seal of said Court this 9th day of August, A. D. 1915.

[SEAL.] FRANK E. McKEAN, *Clerk,*
By SEBA H. MILLER, *Deputy.*

I, E. O. Randall, Reporter of the Supreme Court of Ohio, do hereby certify that in the disposition of the two motions above named no opinion was filed with me by the Court.

In witness whereof, I have hereunto subscribed my name and affixed the seal of said Court this 9th day of August, A. D. 1915.

[SEAL.] E. O. RANDALL,
Supreme Court Reporter.

65 THE STATE OF OHIO,
Crawford County, ss:

I, G. Goldsmith, Clerk of the Court of Appeals, within and for said County and in whose custody the Files, Journals and Record of said Court are required by the laws of the State of Ohio to be kept, hereby certify that the Court of Appeals filed no opinion in the case of Erie Railroad Company, Plaintiff in Error, Versus Henry M. Stone and Clark Noble, etc., Defendants in Error.

In testimony whereof, I do hereby subscribe my name officially, and affix the Seal of said Court at the Court House in Bucyrus, in said County, this 6th day of Sept., A. D. 1915.

[Seal the Court of Appeals of Ohio, Crawford County.]

G. GOLDSMITH,
Clerk Court of Appeals.

66 STATE OF OHIO,
Crawford County, ss:

In obedience to the commands of the within writ, I hereunto transmit to the Supreme Court of the United States, a duly certified transcript of the complete records and proceedings in the within case, together with all things concerning the same, and have attached hereto the Bill of Exceptions which is made a part of this transcript.

In witness whereof, I have hereunto subscribed my name affixed the seal of the said Court of Appeals of Crawford County, Ohio, in the City of Bucyrus, this 24th day of September, A. D. 1915.

[Seal the Court of Appeals of Ohio, Crawford County.]

G. GOLDSMITH,
Clerk Court of Appeals.

67 & 68 STATE OF OHIO,
Crawford County, ss:

I, G. Goldsmith, Clerk of the Court of Appeals of Crawford County, Ohio, do hereby certify that the foregoing petition for writ of error, assignment of errors, order allowing writ of error, writ of error, citation and acceptance of service thereof and certificate of Court Reporter are the original papers filed in this Court in the above entitled cause; that the foregoing copy of bond is a true and correct copy of the original bond filed in said cause; that the printed copy of the record attached hereto is a true and correct copy of the printed record filed in said Court of Appeals, and used in consideration of said cause; that the foreoing transcript of the docket and journal entries is truly taken and correctly copied from the records of said Court.

In witness whereof, I have hereunto subscribed my name and affixed the seal of said Court of Appeals, of Crawford County, this 24th day o*g* September, A. D. 1915.

[Seal the Court of Appeals of Ohio, Crawford County.]

G. GOLDSMITH,
Clerk Court of Appeals.

69 14913.

C. P. No. 9204. C. C. No. —.

STONE AND NOBLE
vs.
THE LAKE ERIE & WESTERN RY. Co. et al.

Bill of Exceptions.

Date of the Overruling or Decision, March 23″, 1914.
Exceptions Filed with Clerk of Trial Court, April 9″, 1914.

G. GOLDSMITH, *Clerk,*
By EDITH FORREST, *Deputy.*

(Must be within Forty Days after the overruling or decision.)

Notice of Filing, mailed to W. J. Geer, April 9″, 1914.

G. GOLDSMITH, *Clerk,*
By EDITH FORREST, *Deputy.*

(By the clerk to adverse party or his attorney, Forthwith after Filing.)

Received April 21″, 1914.

WM. F. DUNCAN,
Trial Judge.

Correct and Allowed this 21″ day of April 1914.

WM. F. DUNCAN,
Trial Judge.

Transmitted back to Clerk 4/21, 1914.

WM. F. DUNCAN,
Trial Judge.

Filed Apr. 25, 1914. G. Goldsmith, Clerk Court of Appeals, Crawford, Co.

70 Filed Jun. 10, 1915. Supreme Court of Ohio, Frank E. McKean, Clerk.

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JAMES T. CLOSE,
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71 Filed Jun. 10, 1915. Supreme Court of Ohio, Frank E. McKean, Clerk.

"O."

Bill of Exceptions.

In the Common Pleas Court of Crawford County, Ohio.

No. 9336.

HENRY M. STONE and CLARK NOBLE, Partners Doing Business under the Firm-name of Stone & Noble, Plaintiffs,
vs.
THE LAKE ERIE & WESTERN RAILROAD COMPANY, and THE ERIE RAILROAD COMPANY, Defendants.

Bill of Exceptions.

Mr. W. J. Geer, for Plaintiff.
McBride & Wolfe, and Mr. Frank Pigman, for defendant Erie Railroad Company.

Be it remembered, that on the trial of this cause at the January Term, A. D. 1914, of the Common Pleas Court of Crawford County, Ohio, before Judge Wm. F. Duncan, and a jury, the plaintiffs, to maintain the issue upon their part, gave and offered to the jury the following evidence, to-wit:

Plaintiffs' Evidence.

Mr. McBride: Your Honor, we ask for a separation of the witnesses.
Order of separation of witnesses made as to both sides.
Judge Wolfe: We make an objection, and let it be made before the introduction of any evidence, in the absence of Henry Nolte, one of the parties, he being trustee in bankruptcy for Clark Noble, one of the plaintiffs, who is a bankrupt, and we object because we think he ought to be made a party plaintiff, and, therefore, any evidence in the absence of said Nolte being made a party—do you admit that said Henry Nolte is the said trustee in bankruptcy for Clark Noble and that said Clark Noble is a bankrupt?
Mr. Geer: Yes.
Said objection overruled; def't excepts.

72 HENRY M. STONE, who, being duly sworn, upon direct examination, by Mr. Geer, testifies, as follows:
Q. 1. What is your name?
A. Henry M. Stone.
2. Where do you live?

A. I live in Crawford County, Ohio.

3. How long have you resided there?

A. Why, about 20 years.

4. What business were you engaged in in 1906 and 1907?

A. Shipping horses.

5. With whom were you associated in business during the year 1906?

A. Mr. Noble.

6. What was his first name?

A. Clark Noble.

7. Where does he reside?

A. He resides in Morrow County near Iberia.

8. Mr. Stone, what road runs through Lima to Martel, Ohio, and to East Buffalo, New York?

A. Erie road.

9. Have you had experience with them as a shipper?

A. I have shipped a good many different horses, loads of horses there.

10. State whether or not that railroad is a common carrier.

A. It is.

11. Now, then, did you have any transactions or business relations with the Erie railroad on or about the 10th day of October, 1906?

A. We did; we shipped a load of horses over it.

73 12. Now, you may state to the jury where you shipped those horses from and to what place.

A. We shipped the horses from St. Marys, Ohio, to Martel, Ohio, by the way of The Lake Erie & Western, and the Erie Railroad; The Lake Erie & Western to Lima, and from Lima to Martel over the Erie.

13. Who purchased those horses at St. Marys?

A. Myself and Mr. Noble and Mr. Smith.

14. And when were they loaded, if you know?

A. Why, they were loaded—we shipped the 10th, isn't that the date?

15. 10th of what?

A. October.

16. Where shipped from?

A. St. Marys.

17. Describe to the jury the character of these horses.

A. This was an extra good load of big feeding horses——

Motion to take answer from jury; motion overruled; def't excepts.

A. They were a good load of big feeding horses and big horses.

Motion to take answer from jury; motion overruled; def't excepts.

18. What was their condition when loaded at St. Marys?

A. They were sound and right in every way.

19. Do you know how long they were on the road being shipped from St. Marys to Martel?

A. Yes.

20. Let me ask you first how many horses were there in that shipment?

A. Sixteen head.

21. How long were they on the road being shipped from St. Marys to Martel?

A. Thirty six hours.

22. What do you know, if anything, about their having
74 been fed and taken care of en route?

A. No feed bills charged us.

23. What do you mean by that?

A. Well, the railroad company when they have them in their care, if they feed them they charge us up with the feed on the horses.

Mr. McBride: We move to take the answer from the jury, each and every part of it, and to instruct the jury not to regard it.

The Court: With the qualification that the witness has given I think the answer might be proper, but I will sustain the motion and I instruct the jury not to consider the answer.

24. Well, what will you say, Mr. Stone, as to these horses having been fed and watered or cared for during the time they were being shipped?

Objected to; ob. overruled; def't excepts.

A. They were not fed and watered.

Motion to take answer from jury.

The Court: You are asked what you know about it.

Motion sustained.

25. Do you know whether they were fed or watered?

A. No, I did not see them and I did not go there with them. Mr. Smith did.

26. Now, when did you last see those horses before they left St. Marys?

A. I saw them the day before they left.

27. Were you there when they started at St. Marys?

A. No, sir, I was not.

28. I will ask you what you did with reference to that shipment of horses before they were put upon the cars as to taking any photographs?

A. Why, we had their photographs taken. They were a
75 very nice bunch of horses and we wanted the pictures of them so we had a man come and take their photograph.

29. How long before you placed that shipment on the car?

A. Why, it was in the forenoon before.

30. I hand you a photograph card, marked "Plaintiff's Exhibit A", and one "Plaintiff's Exhibit B" and also one marked "Plaintiff's Exhibit C", and ask you to examine them.

A. Those are the pictures.

31. I will ask you to state to the jury what those photographs are.

Objected to; ob. overruled; def't excepts.

A. They were taken of those horses, this load of horses that we shipped on the tenth.

32. Are the horses represented in those photographs the horses you shipped?

Objected to; ob. overruled; def't excepts.

A. Yes, sir.

33. Now, when did you say those photographs were taken?

A. They were taken in the forenoon or afternoon before; and I couldn't state just which.

34. How long after those photographs were taken did you leave and not see these horses in St. Marys again?

A. I left on the five o'clock train on the 10th, the day these horses were shipped.

35. In the morning?

A. Yes.

36. When were they shipped?

A. They were shipped in the afternoon about one or two o'clock.

Motion to take answer from jury.

The Court: If he left in the morning before they were shipped, he can not tell when the horses were shipped, and the answer is taken from the jury; the jury will not regard it.

76 37. State who had charge of the shipment?

A. Mr. Smith and Mr. Noble.

38. Mr. Noble was there with you?

A. Yes.

39. Who is Mr. Smith?

A. Why he lived at St. Marys, working for us at the time buying horses.

40. When did you next see this shipment of sixteen horses?

A. I saw them in about a week afterwards at Mr. Noble's farm donwn near Martel, Iberia.

41. What was their condition then?

A. Why, they were bruised up and some of them had their stifles hurt.

42. Describe their condition, the condition you found the sixteen horses in at that time.

A. Some of them were lame and they were gaunt looking; looked like they had been very roughly used.

Motion to take last clause of answer from jury; motion sustained.

43. You may state what their bruises were or the condition which existed with those horses when you saw them other than what you have already said.

Objected to; ob. overruled; def't excepts.

A. Well, they were somewhat cut on the stifles, somewhat bruised on their legs, forelegs and some on the hind legs, looked like they had been down in the car and had been tramped on.

Motion to take last part of answer from jury; motion overruled; def't excepts.

Mr. McBride: We make a motion to take from the jury the entire answer and each part thereof, and to instruct them not to regard the same.

Motion overruled; def't excepts.

77 44. Mr. Stone, where were these horses when you saw them after they arrived at their destination?

A. They were at Mr. Noble's barn.

45. Did you have any conversations with any of the officials of the Erie Railroad Company regarding them?

A. No, sir.

46. Did you see this shipment of horses from the time they left St. Marys until they got to Noble's barn?

A. No, sir, I did not.

47. Now, Mr. Stone, did you have any business dealings with the Erie Railroad Company, or The Lake Erie & Western Railroad Company, on or about the 20th day of March, 1907?

A. I did.

48. What was that business?

A. I shipped a load of horses from St. Marys to Buffalo.

49. Were they your horses or anybody else interested in them?

A. Mr. Noble was interested.

50. You said "I shipped", what did you mean by that?

Objected to; ob. overruled; deft. excepts.

A. I meant I was there and had the billing of the horses at the time.

51. Who were you acting for?

A. For myself and Mr. Noble, Stone & Noble.

52. Now, you may describe what you did there with that carload of horses—how many were they?

A. Why, there were 22 head.

53. What kind of class of horses were they?

A. A good business class of horses.

54. What about being clean or without blemish?

Objected to as leading; ob. overruled; deft. excepts.

78 A. They were a good clean lot of horses, good lookers.

55. When did you ship those horses and where from?

A. From St. Marys, Ohio.

56. Over what route?

A. The Lake Erie & Western to Lima and over the Erie to Buffalo.

57. Who helped to load them at St. Marys?

A. I and Mr. Smith helped to load the horses and we put in a part of the load at Kenton.

58. How many horses did you load in this second shipment at Kenton?

A. We loaded eleven head.

59. And what was the class of those eleven head of horses you loaded at Kenton?

A. They were good horses.

60. What was their condition?

A. They were sound and all right and in good condition.

61. You loaded them at Kenton on what road?

A. On the Erie Railroad.

62. Did you notice at that time the condition of the other horses already in the shipment?

A. They were all right; they were tied and I went in the car and unloosened them and put the balance in, put them all in loose together, twenty two head of them.

63. Now, Mr. Stone, when did you next see them?

A. I went with them from there to Marion.

64. Marion in what state?

A. Ohio.

65. Marion is on what railroad?

A. On the Erie Railroad.

66. What did you do there regarding this shipment of horses?

A. Well, sir, I went from the yard up to the yardmaster's office and asked him——

79 Mr. McBride: We object to any talk with any one. He has not said what the yardmaster was.

Witness: I said I went to the yardmaster's office.

The Court: Did you get information of this car from him?

A. I had to have information as to when I would get out of there and they keep those people there for that purpose. The yardmaster has the duty of shipping out these horses.

67. How do you know this was the yardmaster you talked to?

A. Why, I asked him.

68. What did he say?

Objected to; ob. overruled; deft. excepts.

A. He said the horses would not go out until the next day.

Motion to take answer from the jury.

The Court: I don't think it is important to know what the yardmaster said as to when the horses would go out so much as it is when did they go out, so I sustained the motion and the jury will not consider that answer.

69. Were they in the yard at Marion?

A. They were.

70. And when did they arrive there?

A. Arrived at Marion at nine o'clock in the evening.

71. Of what day?

A. Why, of the 20th.

72. Do you know when they left Marion?

A. I do not.

73. What information did you have on the subject from any of the officials in charge of the yards at Marion, Erie officials, as to when said shipment of horses would leave Marion?

Objected to; ob. sustained; pl'ffs excepts.

80 74. What did you do with reference to that shipment of horses further than that?

A. I didn't do anything; I went and walked from there to Marion and took the cars and went home. I didn't stay there all night. I walked from the yard office.

75. Did you notice the condition of the horses when at Marion?

A. No, sir.

76. What was the condition of the weather or whether daylight or dark?

A. It was dark.

77. Where did you go?

A. I walked through the yards to Marion, about a mile and a half, and took the cars and went home on the Big Four railroad.

78. When did you next see these horses?

A. At Buffalo on the following Saturday afternoon.

79. And when did you leave them at Marion?

A. Wednesday.

80. When did you leave for Buffalo?

A. I left on Friday night at twelve o'clock.

81. Now, Mr. Stone, were you present at the time when these horses were unloaded at Buffalo?

A. I was; yes, sir.

82. What time did they arrive there?

A. They arrived there at half past two o'clock Saturday afternoon.

83. How long had they been on the road during that shipment?

A. About eighty five hours.

84. State to the jury what the condition of those horses was when they were unloaded at Buffalo; just describe that fully to this jury.

A. Why, they were bruised up and some of them looked like they had been down in the cars and tramped on.

Objected to.

81 Motion to take answer from jury.

The Court: Just tell the appearance of the horses.

Motion sustained; pl'ffs excepts.

A. Two horses had their heads all bruised up, eyes swollen up and skin off of them and in addition other ones were bruised and lame and they were gaunt, and their eyes looked glassy and in very bad condition.

Motion to take last clause of answer from jury; motion sustained.

85. Describe what you mean when you said they were in very bad condition.

Objected to; ob. sustained.

86. In addition to what you have already stated you may state that.

A. One of them was sick when they came off the car and he had to be sent to the hospital and afterwards died.

87. What else about them?

A. Well, we put them in the barn and a man came to take care of them and I hired an extra man to help take care of them and kept him there until twelve o'clock that night, and we bathed those wounds with application and had them taken care of the best we could and had them watered and when we took them to the water trough we had to stand there with a club——

Objected to.

Mr. Geer: I think that is competent. The horses could not tell and he can.

Mr. McBride: We object to each and every part of the answer, and move that each and every part of it be taken from the jury.

The Court: The answer so far may stand.

Motion overruled; deft. excepts.

88. Any action or conduct of the horses you may give that to the jury.

A. Well, when the horses came in we had to be very careful about watering them and we did not dare to give them——

82 Motion to take answer from jury; motion overruled; deft. excepts.

A. —we had to give them two or three swallows of water at a time and take it away so that they would not get too much water.

Motion to take answer from jury; motion overruled; deft. excepts.

89. How did you get them away from the water?

A. To get them away from the water had to hit them over the head with a stick to get them out. They just kept their heads right down in the water.

Motion to take answer from jury; motion overruled; deft. excepts.

90. State further action of the horses at the time you unloaded them.

A. We got them into the barn and some of them so weak that they staggered going to the barn; some would eat and some would not and we took care of them as best we could.

91. Do you know as a shipper, Mr. Stone, horses that are being shipped over the Erie from Ohio to Buffalo, what is the fact and custom of the Erie Railroad Company as to the feed for the horses and feed bills?

Mr. McBride: We object. There is on plea of custom here at all.

Mr. Geer: I want to prove it was the custom and what was done in this case as to how much was fed these horses en route.

The Court: You better qualify him to swear about custom first.

92. Well, Mr. Stone, you know, do you or do you not, what the custom of the Erie Railroad Company is and was at the time of this shipment made and before and after as to feeding and watering and care for stock being shipped by them?

A. They had to care for the stock.

Motion to take answer from the jury; motion sustained.

93. Do you know what their customs and duties are?
A. Yes, sir.
94. You may state what they are. What they were before this shipment and at the time of this shipment.

83 Objected to; ob. overruled; deft. excepts.

A. We put the horses in the car and they seal the car and we have no control of those cars at all. They have men——

Mr. McBride: We move that each part of that answer be taken from the jury.
The Court: The question is what was the custom of the railroad company as to the feeding of the horses and the care for them?
The motion is sustained and the answer taken from the jury and the jury will not regard it.
Motion sustained; pl'ff excepts.

95. Now, state what the custom is as to the feeding and watering of the stock.

Objected to; ob. overruled; deft. excepts.

A. The custom is for the railroad company to feed the horses every 28 hours.

Motion to exclude answer——

96. What was at the time the shipment was made?

Objected to; ob. overruled; deft. excepts.

A. That was the custom at the time the shipment was made to feed and water them every 28 hours.

Motion to take answer from jury; motion overruled; deft. excepts.

97. Now, Mr. Stone, with reference to the amount of food that is furnished stock en route from the place being shipped, what is the custom of the railroad company as to the method and manner of informing the shipper what was done in that direction and what was it at the time this shipment was made?

Objected to; ob. overruled; deft. excepts.

A. Why, they have their men feed the horses and they make a bill of the feed charges and send it to the commission firm—their agent at the destination who presents it to the commission firm and
84 they put it in with the freight charges and their expenses on the horses.

Mr. McBride: We move to take the answer and each and every part of it from the jury.
Motion overruled; deft. excepts.

98. Now, as to this shipment of twenty two horses, you were at Buffalo?
A. I went through to Buffalo and sold all of these horses.

99. Did you receive such a bill from the railroad company as the bill for that feed of the horses?

Objected to; ob. overruled; deft. excepts.

A. Yes, sir.

Motion to take answer from jury; motion overruled; deft. excepts.

100. The stenographer has marked this paper, "Plaintiff's Exhibit D." Did you ever see that paper before?

A. Yes, sir.

101. Where did you see that paper first?

A. At Buffalo.

102. And by whom or from whom did you receive it?

A. I received it from the Crandall Horse Company.

103. I will ask you whether there is any other information conveyed to the shipper as to the amount of feed given to the horses en route other than that paper?

Objected to; ob. overruled; deft. excepts.

A. No, sir.

104. Did you receive any other bill for that feed for the horses say and except this one?

A. No, sir.

105. How many horses were in that shipment?

A. Twenty two head of horses.

85 106. Speaking of the shipment, Mr. Stone, now the second shipment that was made, and you describe that as shipped on the 6th of March, 1907, how many horses were in that shipment?

A. Twenty three head.

107. And this bill, marked "Plaintiff's Exhibit D," state whether or not that discloses the amount of feed furnished those twenty three horses from the time they were shipped at St. Marys, Ohio, until they arrived at Buffalo, New York?

A. It does.

108. State, if you know, how much feed was furnished them.

Judge Wolfe: We object to the witness reading from that Exhibit D.

The Court: All he knows about it is what the exhibit states and it speaks for itself.

Mr. Geer: I want to know what that represents in the amount of feed 300, $3.00: I want to know what that represents.

The Court: Does the witness know?

109. I will ask you if you know how much feed this charge of $3.00 on this bill paid for.

A. That was the charge.

110. Do you know what that represents?

A. I do, yes.

111. Now, what does it represent?

Objected to.

The Court: I do not think he has any right to testify to that. He

does not know whether they were fed anything and all he knows is what the exhibit says.

Objection sustained.

112. I will ask you what that figure 3 means: explain that to the jury.

86 The Court: I think the jury can understand that as well as the witness.

Objection sustained; pl'ffs except.

113. Do you know from your personal knowledge, Mr. Stone, how much hay or feed at that time could be purchased en route by the Erie Railroad Company to be fed to stock for $3.00?

Objected to; ob. sustained; pl'ffs except.

114. On this Exhibit D there are certain figures; on the right hand side of it first is 7245, the next is 300 and the third is 300 and the fourth 7845: explain what those figures are and what they represent.

Objected to; ob. sustained; pl'ffs except.

115. Now, Mr. Stone, do you have any other bills other than that one presented to you for feed furnished those 23 head of horses en route from St. Marys to Buffalo, or did you have?

Objected to; ob. overruled; deft. excepts.

A. No, sir, I have no other feed bill presented to me.

116. Who helped you to unload those horses at Buffalo?

A. The railroad company unloaded them. They have men for that purpose.

117. Do you know who they were?

A. I should have said the Crandall Horse Company. They have men for that purpose.

118. Do you know any of the men who helped to unload this shipment on horses shipped on the 6th of March?

A. I do.

119. Name them.

A. John Baker, a fellow named Lasby working for the Crandall Horse people.

120. Is John Baker the man whose deposition is here on file?

A. Yes, sir.

87 121. Now, state what, if anything, was done, or what, if anything, you did when you loaded these horses at St. Marys as to signing any bill of lading or contract, or otherwise, with the railroad company at the shipping point.

A. I signed a bill of lading there for one of the loads of horses and I would not say as to the others, I think Mr. Smith.

122. State what you signed and how presented to you.

A. Well, they had this bill of lading. He wrote it out in the office.

Judge Wolfe: What difference does it make?

Mr. Geer: It makes a good deal of difference because the shipper is entitled to know.

Judge Wolfe: We object.

Objection argued.

The Court: If this is admissible at all, it is in rebuttal, and you are anticipating the defence. I will sustain the objection at present.

123. Mr. Stone, did you have any conversation with the livestock agent or the party in charge of the Erie Railroad at Buffalo upon the shipment of this carload of horses as well as the one subsequent to it?

A. I did, sir.

124. Who was that person?

A. Barney Stewart.

125. What position did he hold with the Erie Railroad Company at Buffalo?

A. He was its livestock agent.

126. When did he and you hold such conversation?

A. On the Monday morning after these horses were shipped, at Buffalo.

127. When did the horses arrive at Buffalo?

88 A. They arrived there on Saturday afternoon.

128. I mean the first load of horses.

A. They arrived there at half past four o'clock Sunday morning. They had been on the road from Wednesday about noon until Sunday morning at half past four o'clock.

129. What did you say to Mr. Stewart, the agent, with reference to the condition of these horses?

Objected to.

The Court: What do you claim for that, Mr. Geer?

Mr. Geer: To show that he went to the railroad company's agent and asked him to come and look at these horses and what he said to him. It was notice to the company and when he did so and they refused to do it, it would work a waiver.

The Court: There was no written notice given.

Mr. Geer: I don't know. I am inclined to think there was not.

The Court: And there was no affidavit filed. I believe I will let this in for the present anyhow. I want to know about this.

Objection so overruled; def't excepts.

A. I went to Mr. Stewart in the morning and met him right in front of the Crandall House, the barn right back of it, and I asked him to come and look at these horses, that I had a bad shipment, the horses badly hurt, and he says "I don't want to seen the darned horses. If you don't quit shipping over the Erie Railroad, they will kill all of the horses you have. They are not in shape to ship——

The Court: Was he *of* the agent of the railroad company?

A. He was the agent of the railroad company and sees to unloading these horses and tends to the livestock part of it.

Mr. McBride: We move to take the answer to that question (question 129) from the jury.

Motion overruled: def't excepts.

88½ Mr. McBride: We move to take the last answer also from the jury.

Motion overruled; def't excepts.

130. Now, let me go to the next load of horses. I will get to that. You have described the first shipment of horses to Buffalo that left St. Marys on the 6th of March, 1907.

A. Yes.

131. When did you next make a shipment over the Erie?

A. On the 20th of March I made a shipment.

132. What year?

A. The same year?

133. Where was that from?

A. St. Marys, Ohio.

134. To what place?

A. East Buffalo, New York.

135. How many horses were there in that shipment?

A. Why, there were ten horses loaded at St. Marys and thirteen horses loaded at McGuffey.

136. 23 or 22 in the last load?

A. The last shipment there was horses put in at Kenton. There were eleven horses put in at Kenton.

137. That shipment included how many horses?

A. Twenty two.

138. Where did they go to?

A. To East Buffalo, New York.

139. Who helped to load them?

A. Mr. Smith.

140. What part of the loading of those horses did you take?

A. I put in the horses at Kenton.

141. What did you have to do with that load at St. Marys?

A. I don't have anything to do with the loading of them.

89 142. How long before they were loaded did you last see them?

A. Well, there was one load—I was there in the forenoon; it was one of those two loads and I would not say which one.

143. Describe the class and character of the last load of horses loaded at St. Marys.

A. A good load of horses and in good condition.

Motion to take answer from jury; motion sustained.

144. Describe the character and class of those horses loaded in this last load at St. Marys.

A. Why, they were a sound lot of horses and in good condition; some big horses and some medium sized horses.

Motion that last part of answer be taken from jury; motion overruled; def't excepts.

145. Now, you may describe, as near as you can, the class and kind of horses that you put into this load at Kenton.

A. I put in some good heavy horses at Kenton.

Motion to take answer from jury; motion sustained.

The Court: Mr. Stone, you are not specific enough in your answer. If these were draft, colts or trotting horses, so state it.

A. Why, they were draft horses, a few chunks, about fourteen hundred pounds, general purpose horses, wagon horses and one or two drivers in the load and some big horses.

146. What would you say as to their quality?

A. They were good quality.

147. What do you mean by good quality? Were they of a clean character?

Objected to; ob. overruled; def't excepts.

A. Yes, sir.

148. When did you last see that shipment of horses?

A. I saw them at Buffalo.

90 149. I mean when did you last see them after they were fully shipped and loaded?

A. Why, they came to Kenton and I was with them from Kenton to Marion.

150. Did you examine them?

A. I examined them at Kenton.

151. What was their condition at Kenton?

A. They were all right.

152. You spoke this morning you loaded some other horses at Kenton.

A. This was the horses. The others were at McGuffey.

153. Part of the twenty three were loaded at McGuffey?

A. Yes.

154. And part of the twenty two at Kenton?

A. Yes.

155. What occurred at Marion?

A. They were left in the yards there.

156. At what time?

A. Nine o'clock in the evening.

157. How long had they been on the road from St. Marys to Marion?

A. Well, loaded there about noon and they came through to Kenton, and I put on the horses and went on to Marion with them.

158. That afternoon?

A. That afternoon; yes, sir.

159. Mr. Stone, what, if anything, did you do regarding those horses at Marion?

A. Why, I went to the yard office and asked the yardmaster when they would go out.

Motion to take answer from jury; motion sustained; pl'ffs except.

160. When did you next see them?

A. I next saw them in Buffalo.

91 161. How long after you left them at Marion?

A. Well, it was on the next Saturday, at two o'clock.

162. What day of the week was it you left them at Marion?

A. Why, it was on Wednesday night at nine o'clock.

163. When did they arrive at Buffalo?

A. On the following Saturday at half past two o'clock in the afternoon.

164. Did you see them as soon as they arrived?

A. I did.

165. What was their condition?

A. Well, they were in a bruised up condition.

166. Describe more definitely; tell what all was the matter with those horses when they arrived at Buffalo.

A. Well, some of them looked like they had been down in the car.

Motion to take answer from the jury; motion sustained.

167. Describe the condition just as you found them.

Objected to; ob. overruled; def't excepts.

A. Well, they were bruised up, some of them were lame; one of the horses was sick and had to be taken to the hospital and afterwards died.

The Court: Is this the first or second load you are speaking of?

A. This is the second load I speak of. He got the wrong testimony in the first place.

168. I am asking you about the second load.

A. Well, I explained that part of it.

169. Well, now as to the first load; had you described the condition of that load to the jury?

A. No, I had not. I had not gone over the first load, Mr. Geer.

170. Well, I will ask you to describe the condition of the first load when they arrived at Buffalo.

92 A. They arrived in Buffalo at 4:30 Sunday morning, loaded at McGuffey Wednesday. I got out of bed and went down. They called me to see the horses and I went down to the barn. They put them in the barn and some of them was bruised up badly and some of them would not eat and in bad condition generally.

Motion to take answer from jury as too general; motion sustained.

A. Well, they were very gaunt, dry; their eyes were glassy and bruised up a good deal and some of them were lame.

171. How lame and what part?

A. Had been bruised on the leg, down in the car, I suppose, and tramped on.

Motion to take last part of answer from jury; motion sustained.

The Court: Give their appearance.

A. Well, they were all bruised up.

172. Describe fully the condition of the first carload. We will go back to that.

A. Well, they were bruised up; some of them lame, scars on the legs and about the eyes, and they were very gaunt and dry and some of them would eat and some would not eat and we had to take a great deal of care of them to get them in shape to be sold at all.

173. Now, as to the second load, describe its condition.

A. Well, they were——

Objected to as already gone into.

The Court: He has been over that fully. He gave the answer to the second load this morning, and you then thought he was answering as to the first load.

174. Of which carload of horses did the one die?

A. Second load.

175. What was the value of that horse?

A. $300.00.

93 Objected to and motion to take answer from jury.

The Court: On the ground of qualification?

Mr. McBride: Yes, and to the market value.

Objection and motion sustained.

176. You had one horse died?

A. Yes, sir.

177. Do you know what the value of horses were in the Buffalo market at the time these horses arrived there?

A. I think I do.

178. I will ask you whether or not these horses arrived or whether or not they arrived within reasonable time of an ordinary shipped from St. Marys to Buffalo.

Objected to; ob. sustained.

Mr. Geer: We except and expect to prove by the witness, if he were permitted to answer, that it was not a reasonable time, but an unreasonable time.

179. You have stated you are acquainted with the value of horses at the Buffalo market at that time, now, what was the value of that roam horse that died, what would have been his value in the Buffalo market at the time he arrived there, had he arrived there within a reasonable time and in good condition?

Objected to; ob. sustained; pl'ff. excepts.

180. Now, I will ask you what was the value of that horse at Buffalo at the time he arrived there and in the condition he did arrive.

Objected to; ob. overruled; deft. excepts.

A. He was not worth anything. He died.

181. Now, I will ask you, Mr. Stone, to state what the value of this first carload of horses, and I am speaking of the March 6th shipment to Buffalo, what was the fair, market value of that carload of horses *was* in the Buffalo market in the condition in which they arrived.

94 Objected to; ob. overruled; deft. excepts.

A. $300.00.

182. Now, what would have been the fair, market price of that

first carload of horses shipped to Buffalo, if they had arrived there, or been shipped expeditiously.

Objected to.

The Court: Leave that part of the question out.

183. Well, what would be the reasonable time of shipment of a carload of horses from St. Marys to Buffalo?

Objected to; ob. sustained; pl'ff. excepts.

184. Now, what would have been the fair, reasonable market value of that first carload of horses at Buffalo at the time they arrived if they arrived in good condition.

Objected to; ob. overruled; deft. excepts.

A. $400.00.

185. Now, take the second carload of horses shipped there on the 20th of March. Now, what was the fair, market value of that carload of horses in the Buffalo market at the time they arrived and in the condition in which they did arrive?

A. $4500.00.

186. I mean in the condition in which they did arrive at.

A. Oh, in the condition they did arrive. Well, around $3000.00.

187. Now, what was the fair, market price of that carload of horses at the Buffalo market on the day they arrived, if they had arrived in good condition?

Objected to; ob. overruled; deft. excepts.

A. $4500.00.

188. Now, Mr. Stone, did you know the reasonable, market value of horses, such as you shipped to Martel on the 6th day of October, 1906?

A. Yes, sir.

95 189. I will ask you what was the fair, market price of those sixteen horses in the market at Martel, if they had arrived in good condition and at the time they did arrive?

Objected to; ob. overruled; def't excepts.

A. $265.00 or $270.00 apiece.

190. Now, what was the fair, market price of those horses at Martel at the time they did arrive and in the condition they were in when they did arrive?

Objected to; ob. overruled; def't excepts.

A. $235.00 or $240.00 apiece.

191. Now, what was the cause of this condition as to these horses other than described?

Objected to; ob. sustained; pl'ffs except.

192. I will ask you whether or not the condition you described, in which you found these horses after they arrived at their destination, existed at the time they were put in the cars and shipped.

A. No, sir.

193. Do you know how many miles it is from St. Marys to Lima?
A. About 35 miles.
194. How many miles from Lima to Martel?
A. Sixty miles.
195. Do you know how many miles from Lima to East Buffalo?
A. About 230 or 240 miles.
196. Have you made frequent shipments from Lima to Buffalo?
A. Yes, sir.
197. You may state what the reasonable time of shipment by freight from Lima to East Buffalo is.

Objected to; ob. sustained; pl'ffs excepts.

198. Now, Mr. Stone, I will ask you whether or not you had any conversation with any of the officers and agent of the Erie
96 Railroad Company at Buffalo with reference to putting in a claim to said company for damages by reason of the injuries of those horses during shipment?
A. No, sir.
199. Have you a feed bill or a bill for the second carload of horses that went to Buffalo, namely the 22 horses?
A. No, sir, I have not. I had one and Mr. Barker has it in his papers.
200. Have you made any effort to get it?
A. Yes.
201. With what result?
A. I did not get it.
202. Where is Mr. Barker?
A. At Wellston, Ohio.
203. I will ask you whether that paper will disclose the amount of feed that was furnished that shipment of horses?
A. Yes, sir.

Motion to take answer from jury; motion sustained.

The Court: You have to show first that it is beyond your reach.

204. Mr. Stone, have you been able to procure that paper?
A. No, sir, I have not.
205. What effort have you made to procure it?
A. I have asked him for the paper two or three different times.
206. What does he say upon the subject?

Objected to.

The Court. Mr. Barker was his attorney at that time?
Mr. McBride: Yes.
Mr. Geer: We don't know whether he has it now or not, but we have asked him for it.
Objection sustained.

97 207. I will ask you whether or not you testified in the former trial of this case.
A. Yes.

208. I will ask you whether at that time the bill for the feed and care and so forth of the second carload of horses could be found.

Objected to.

The Court: The time to be used is now. Can it be found now?

209. Can it be found now?

A. No, sir.

210. Do you know where it is?

A. Well, I took it down to Barker's office.

211. Do you know where it is now?

A. No, I do not.

212. Has it been in your possession since?

A. No, sir.

213. Have you had any access to it?

A. No, sir.

214. Do you know as a fact whether Mr. Barker has it or not?

A. I don't know.

215. When did you last see it?

A. The day I took it down there to him.

216. When was that with reference to the former trial?

A. It was during the trial. I went home and got it and took it to him the next day and they accepted these feed bills and I don't know where it is now.

217. Now, I will ask you to state the contents of that feed bill.

Objected to.

The Court: I don't think it is a sufficient showing to allow secondary evidence to be given. If he paid a bill for the feed of these horses, doesn't he know how much it was? You don't — to
98 show the bill to make his testimony proper as to how much he paid.

218. Very well. Mr. Stone, did you pay any feed bill for that second carload of horses shipped to Buffalo?

A. Yes, sir, I paid a feed bill and—

Judge Wolfe: That's answer enough for that question.

219. Now, Mr. Stone, how much did you pay?

A. I paid for 200 pounds of hay, $4.50 at Kent.

220. Did you pay any further bills for feed?

A. No, sir.

221. Where did you pay that bill?

A. I paid for 200 pounds of hay, $4.50 at Kent.

222. Where did you make that payment?

A. Understand me, it was a charge at Kent and I paid it at Buffalo. I paid all these bills——

Judge Wolfe: I object to all that he paid at Buffalo, and I ask the Court to rule from the jury to exclude all excepting the exact amount of money he paid and where he paid it.

The Court: That was $4.50 you say?

A. Yes.

The Court: The jury will not consider any part of the answer except that he paid $4.50 at Buffalo for this second load of horses for feed for those horses.

223. How long did you say that shipment load was on the road during shipment?

A. It was on the *hours* 85 hours.

224. How many of them?

A. Twenty-two horses.

And upon cross examination, by Judge Wolfe, as follows:—

Q. 1. Mr. Stone, who are Stone and Noble?

99 A. A firm.

2. That is, was doing business?

A. Yes, sir.

3. Were you in partnership at that time?

A. Yes, sir.

4. How long had you been in partnership prior to October, 1906?

A. About six years.

5. How long had you been buying horses?

A. Buying horses all of that time.

6. Where did you ship them to?

A. Shipped them to the Buffalo market.

7. And by what route?

A. Why, we ship them all over the country: some over the Erie railroad, some Lake Shore, some Lake Erie & Western and some over the Nickel Plate.

8. And to Buffalo?

A. Yes, all went to Buffalo.

9. That was your market for all of your horses?

A. Yes.

10. How many carloads had you shipped to Buffalo up to this *this* period of time in 1906?

A. Probably 150 to 200 carloads.

11. When was the next carload you complain about here, the second cause of action?

A. On the 20th of March, 1907.

12. How many had you shipped from the first period of time that you shipped to Buffalo until then?

A. One year we shipped twenty——

13. No, you give your judgment in round numbers up until October, 1906, how many would you say it was up to the 20th of March, 1907, from the first of your shipments?

100 A. Well, I should say 150 carloads anyway.

14. More than the first you gave?

A. No.

15. I am asking you how many carloads probably in your judgment of horses you shipped from any point to Buffalo up to the time of October, 1906 when your first cause of action says, and you gave that number, do you remember what it was?

A. Why, I said from 150 to 200 loads.

16. Now, then, add to that the further shipment up to March, 1907, how many would you say it was?

A. Well, we don't ship so very many in the fore part of winter, and we always commence to ship horses about the holidays.

17. I asked you how many carloads you added to it.

A. Well, I couldn't say just exactly.

18. Oh, just give the round number. You know better than the jury and you know better than I.

A. Well, I just say I don't know, because I don't remember how many we would ship in.

19. I don't ask you how many but about.

Mr. Geer: We interpose an objection to this cross examination as not within the rules and lecturing witness.

20. I am asking you about how many.

A. Well, I said I didn't know.

21. About how many? Make a guess at it.

A. Well, I don't know if we shipped any from October until the first of March.

22. Well, to the 20th of March?

Objected to.

The Court: He says he doesn't know if he shipped any.

The Court: Do you want to leave it that you don't know?

A. Yes.

101 23. Now, when was that third shipment? Were there two shipments in the month of March?

A. Yes, sir.

24. Will you say from October 1906 up until the 6th of March and including the 20th of March that you never shipped a carload of horses into the city of Buffalo except the ones you are complaining about?

A. Well, I would not say positive and I don't recollect. We might have shipped some before that.

25. Will you say you did or did not?

A. Well, I would not say.

26. Are you afraid to say because your counsel objects?

A. No, sir, I am not afraid to say. If I knew I would say.

27. You say you don't know because you don't know exactly whether it is one or ten?

Mr. Geer: We object to counsel's manner of carrying this along.

The Court: Yes, your witness said he did not know whether he shipped any or not.

28. You say you don't know whether you shipped any or not?

A. That is what I said.

29. But you feel you have shipped probably from 150 to 200 carloads up to the time of March, 1907?

A. Yes, sir.

30. Well, how many of those will you say you shipped over the Erie railroad?

A. Well, we shipped a good many over the Erie railroad.

31. Well, how many about?

A. Well, probably—well, say a fifth of them.

32. Now, after March 6th, 1907, and March 20th did you continue to ship any over the Erie railroad?

102 A. Never shipped over the Erie railroad I can recollect of after the load of March 20th.

33. Did you ship any horses?

A. No, sir.

34. Over any road?

A. Yes, sir, shipped horses right along all the last years.

35. Are you still buying horses?

A. Yes.

36. Shipping where, to Buffalo?

A. Yes, to Buffalo, Orville.

37. Have you shipped any to Buffalo since March 6th, 1907?

A. Yes.

38. How many carloads?

A. I can't say, up to the year before last; three years ago, I shipped twelve loads a year before that.

39. You shipped right along; give us some idea how many carloads you shipped to Buffalo since the 20th, of March, 1907?

A. Forty or fifty loads; around there.

40. Now, the first carload was shipped in October, 1906, wasn't it?

A. Yes.

41. That you ever had some trouble with?

A. Yes.

42. Where did you get those horses?

A. We got them around St. Marys and New Bremen.

43. What kind of a car did you ship them in, Lake Erie & Western or Erie car?

A. I could not say.

44. You have no idea about that?

A. No, sir.

45. Where did you car those horses?

103 A. Carred them at St. Marys.

46. Who bought them?

A. I helped to buy them; Mr. Noble bought some of them and Mr. Smith bought some of them.

47. Were you all three in partnership there?

A. No, sir.

48. Mr. Smith was just out for you buying horses?

A. He was buying on commission.

49. He was buying for you?

A. Yes, sir.

50. So that the commission merely meant that was the method of buying? He would pay so much and you allow him so much on every horse he would buy; that is the way of it?

A. Yes.

51. Did he go with the horses at any time?

A. He came over with this one load of horses to Mr. Noble's place in Martel and he came as far as McGuffey with the second load of horses we spoke of.

52. Who went with the third load of horses?
A. I went with them myself.
53. Now, what date were the horses loaded at St. Marys of the first shipment of 1906?
A. I think they were loaded on the 10th of October.
54. Were you present when they were loaded?
A. No, sir.
55. Where were you the day they were loaded?
A. I came home.
56. When you say about some of those horses how many were there?
A. There was sixteen horses in the car.
57. And that composed the first shipment?
A. Yes.
104 58. Where were those horses sent, to Buffalo?
A. They were sent to Mr. Noble at Martel.
59. How many of those horses did you buy?
A. I couldn't say just how many, it has been so long ago.
60. Can't you tell, have you no record of the number you bought?
A. No, sir.
61. Or the number you allowed commissions to Smith on?
A. No, sir.
62. Or that Noble bought?
A. No.
63. There was sixteen horses and didn't you keep a record of those horses so that you knew what you bought and paid?
A. I suppose we did.
64. Did you or did you not?
A. Sure we did.
65. Where is that record?
A. I have not got it.
66. Did you destroy it?
A. I suppose Mr. Noble got the costs of the horses, I didn't have them.
67. Did Noble keep that record or you?
A. He was supposed to.
68. Well, did he?
A. He did, they went to his place.
69. That record will show you what you paid for these horses and give you an idea what sort of a horse it is, the parties and so on?
A. Yes.
70. Did you pay for the horses when you bought them?
A. No, sir.
71. You would go out, see an animal, size it up and buy it?
105 A. Yes, if it suited.
72. And its general appearance?
A. Yes.
73. And its breeding?
A. No, we didn't care about breeding.
74. And its speed?
A. No, sir, not speed.

75. And you bought for draft horses?
A. Yes.
76. Well, you had all the other columns, age and color, general appearance, and weight and the price?
A. Yes.
77. And you don't know where that is?
A. I say I didn't keep it; Mr. Noble did that.

The Court: You are speaking of the first carload?
Judge Wolfe: I am asking as to that.

78. When they were brought to St. Marys, how were they brought there; did you take them in as you bought them?
A. No, sir, a day set for them to bring the horses in.
79. And they were brought there?
A. Yes.
80. Was that same day shipped?
A. No, sir.
81. How long were they kept there after delivered until shipped?
A. Shipped next day.
82. So they came in around. Did you pay part of these horses when you bought them to bind the contractor?
A. Usually gave them two to five dollars a head on them.
83. And they would come in for the rest and deliver the horses?
A. Yes.
106 84. Now, can you tell anything about the kind of horses you had there at that time, the age of any one or color?
A. Well, they were all horses from four to six years old.
85. And which was more valuable, the four or six year olds?
A. That depended upon the quality of the horses.
86. Well, don't you remember the qualities whether four or six years of those sixteen horses?
A. They were all good.
87. I didn't ask you that. You would not have any other kind and the Marion County farmers kept no other kind than good?

Objected to; ob. sustained.

88. I am speaking of these horses and I asked you the particular quality of each horse.
A. Well, they were good, big, rugged, stout——
89. I didn't ask you that. What was the quality of each horse, its color and its age?
A. We had roam horses and different colors.
90. Don't you know how many bay horses you had?

Mr. Geer: We object to this cross examination.
The Court: He has given the sum total what these horses were worth as a carload and now he is asked to take them up separately, and when he gets through that will amount to what he gave as the sum total or might not amount to that or more than that. It is to test the sum total statement.
91. Now, you were there when the horses were delivered at St. Marys the day before shipped to Marion?

A. Yes.
92. Did you pay the money for them?
A. I am not certain as to whether I paid for them or Mr. Smith. Mr. Smith bought some horses there for us.
107 93. Did Noble pay for any?
A. I don't think he did.
94. You say Smith paid for all of them?
A. I think he did.
95. And you didn't do the paying in any case?
A. Not in that load.
96. Did you go away the day they were brought in?
A. Yes—no, sir.
97. When did you go away?
A. I went away the next day, the day they were shipped.
98. What time of the day did you go away?
A. On a train in the morning about half past ten o'clock.
99. Where were the horses that went away?
A. In Mr. Smith's barn.
100. Where was the Lake Erie depot and shipping point, how far from the barn?
A. Oh, probably as far as from—probably a half a mile.
101. Who did you leave there in charge of the horses?
A. Mr. Smith.
102. Who else?
A. I think Mr. Noble was there.
103. Did you see Noble there when you left St. Marys?
A. I think he was there when I left.
104. When did you see Noble again?
A. I saw him about a week afterwards down at his home close to Iberia.
105. Where did you go when you left St. Marys?
A. I went home.
106. Where was home?
A. Up near Galion, about five miles from Galion.
108 107. Which way from Galion?
A. Southeast.
108. Do you know it was Stone left there?
A. I just answered that.
109. I mean Noble; do you know when Noble left there of your own knowledge?
A. No, sir, I don't.
110. But he and Smith were there when you left?
A. Yes.
111. How did you go to your place of living?
A. Well, sir, I go to Galion and drive out or walk out.
112. No, how did you go from St. Marys there?
A. Came to Lima and took the Erie railroad.
113. And went home?
A. Yes, sir.
114. Well, when did you see the horses, any of these horses that

were shipped, again that were bought and you left in the barn there at St. Marys?

A. I saw them about a week afterwards down to Mr. Noble's place.

115. And those were the sixteen horses consigned to Noble?

A. Yes.

116. Did you see all of those there at Noble's place?

A. Yes, sir.

117. What did you see with reference to those horses?

A. I see the horses and they were bruised up.

118. How were they bruised?

A. Well, some hurt in the stifle.

119. Which one?

A. There was a roan horse hurt in the stifle and a black horse bruised on the leg and then other ones hurt in different ways.

109 120. You have named a roan horse hurt on the stifle and a black on the leg; how any other horses hurt? Name them.

A. I couldn't just recollect; it has been so long.

121. Why, you were concerned about these horses, wern't you?

A. Yes, sir, I was not so much concerned about their color as I was about their condition they were in.

122. They were your horses when you saw them down at Noble's barn?

A. Yes, or a portion of them.

123. Now, were they Noble's horses?

A. They belonged to Noble and me.

124. They belonged to both of you when you saw them?

A. Yes.

125. Who was there when you saw them at Noble's?

A. Me and Mr. Noble.

126. Was there anybody else there?

A. I don't recollect any one—some boys taking care of them.

127. Are those boys here?

A. I think so.

128. Are they in the courtroom right now—look back and around and see?

A. I don't see them, no, sir.

129. You have told of one hurt in the stifle and one in the leg. Do you know how any others were hurt?

A. Well, different ones bruised up.

130. No, I am not asking about others but one more, how was it hurt?

A. Well, some of them——

131. No, not some of them—how was one more hurt?

A. Well, there was one hurt in the hind leg.

132. Right in the hind leg?

A. Yes, right on the hock of the hind leg, bruised up.

110 133. What was the indication of this hurt, what did you see?

A. Well, I seen struck and scarred up.

134. And that was all you saw?

A. No, I saw more.

135. Well, you saw that leg was scratched and scarred up, was that all of that leg hurt?

A. Yes.

136. Was there anything else?

A. There might have been.

137. I asked you whether there was and you saw.

A. Well, I can't say there was.

138. That's it. Now, go to the fourth horse, anything the matter with him?

A. There was something the matter with more than five six or seven.

139. There were sixteen there in the barn that went from St. Marys?

A. Yes.

140. Now, I ask you about the fourth horse. Describe that.

A. Well, I couldn't just describe the condition of these——

141. No, I didn't ask you about these, but about the fourth horse.

A. I can not tell.

142. Can you tell anything the matter with any one aside from those three?

A. No, I couldn't tell exactly. I know there was scars on them.

143. Tell where a scar was on a horse other than the three you have mentioned.

A. No, I can not tell.

144. You can't tell a mark on any other horse than the three you have mentioned?

A. Not to my recollection now.

145. Did any of those horses die that were taken in this load?

A. I don't think there was.

111 146. Now, can you tell how much the horse cost that you first described, the roam horse, what you paid for it?

A. I think that horse was a horse—I can't remember the old man's name. I think we gave $285.00 for it.

147. Can you tell how old it was?

A. Well, between six and seven years old.

148. What did you do with that horse?

A. Well, sir, you will have to ask Mr. Noble that question.

149. No, sir, I asked you what was done with it.

A. Well, I don't know what was done with it. We sold them to different ones around.

150. Did you sell it around there in that community?

A. I think so.

151. What did you do with the other one hurt, a black?

A. I couldn't say as to that.

152. And you can't say as to the third one?

A. No, sir.

153. Can you tell what you got for the first or the second or the third?

A. No, sir.

154. Can you tell the first one you mentioned, about $285.00—what did you pay for the second?

A. No, I can't.

155. Can you tell what you paid for the third one?

A. No, sir.

156. Nor you can't tell what you got for either of them?

A. I can't tell you. I didn't keep track.

157. Then you can't tell how much they were injured in value?

A. Not just now, I couldn't.

112 158. But you tried to tell Mr. Geer a little while ago, didn't you?

A. Well, I seen they were injured.

159. But I asked you whether you can tell how much they were injured. You couldn't tell how much you sold each for and bought each for.

A. Well, but I can't tell that, but the bank account is a good deal less.

160. Do you keep a bank account; will you show your bank account to the jury?

A. I haven't got it.

161. You haven't got that?

A. No, sir.

162. Then you don't have anything to refresh your recollection of what you have told the jury?

A. Nothing just now.

163. But is it not a fact you were testifying and telling the jury what the damage was?

A. No.

164. Why you have been telling right in this case. Now, how long was that shipment from St. Marys to Martel on the way? Did you testify or not?

A. I don't know; it was on the road a long time; I think about thirty six hours.

165. That's the way you testify—were you on the road with them?

A. No, sir.

166. When unloading them?

A. No, sir.

167. Or when loaded?

A. No, sir.

168. Then how do you know they were on the road thirty-six hours?

113 A. They told me they were.

Judge Wolfe: Then, your Honor, I ask that be taken from the jury.

The Court: That was taken from the jury when he testified in chief.

169. Now, let's take the load of horses you shipped on the 6th day of March, 1907. That was the second cause of action?

A. Yes, sir.

170. Who bought those horses?

A. I and Mr. Noble and Mr. Smith was buying some for us.

171. Was he buying then on commission?

A. Yes. We bought some at St. Marys and some at McGuffey.
172. How many at St. Marys?
A. I think ten head.
173. How many at McGuffey?
A. Thirteen.
174. Who bought those ten head?
A. I bought some and Mr. Smith and Mr. Noble bought the rest.
175. Can you tell the jury how many you bought?
A. No, sir.
176. Or at McGuffey?
A. I bought them all at McGuffey.
177. Where is McGuffey?
A. It is on the Erie about fifteen or twenty miles east of Lima.
178. And St. Marys on the Lake Erie & Western?
A. Yes.
179. And that's where the ten horses were shipped on the Lake Erie and Western?
A. Yes.
180. And these sixteen horses on the Lake Erie & Western?
A. Yes.
181. And transferred onto the Erie at Lima?
A. Yes.
114 182. And Lima and all those places in Ohio?
A. Yes.
183. And Martel is in Ohio on the Erie road and McGuffey?
A. Yes.
184. And Kent is on the Erie road in Ohio?
A. Yes.
185. And the towns beyond that are outside of Ohio, through which the shipment went to Buffalo on these other cars?
A. Yes.
186. You bought all the horses at McGuffey yourself?
A. Yes.
187. Can you tell the jury how much you paid for the ten horses bought at St. Marys on the second load?
A. I can not now.
188. Or the other?
A. No, sir.
189. Did you keep a book account of that?
A. No, sir.
190. Did anybody in your firm keep any record of it?
A. Mr. Smith bought and paid for the horse and we settled for that, and Mr. Noble would bring his in and we made, or I made a draft.
191. How would he pay with money or check?
A. He paid with check.
192. What account would he draw it on?
A. On his own account.
193. On Smith's account in the bank?
A. Yes.

194. And these other payments made there that you made, whose account draw it?

115 A. On myself.

195. And would Noble?

A. I paid for his horses.

196. Didn't he pay out any money at all?

A. No, sir.

197. Did you pay $25.00 as an earnest of a bargain for those ten horses, $25.00 for each and then pay the remainder after you got in town?

A. No, sir.

198. Did they bring them in without binding the bargain?

A. Sometimes give them two dollars and sometimes five.

199. Now, when you got to McGuffey you bought fifteen there?

A. I bought thirteen there.

200. So there was twenty three horses in that load?

A. Yes.

201. Did you keep any record of the horses you bought and paid for?

A. I suppose I did.

202. Not what you suppose, but did you?

A. Well, we figured them all out together and made a draft for them.

203. What did you do with that record?

A. I have got it.

204. What did you do with it?

A. We settled it.

205. What did you keep it in?

A. On paper.

206. Did you keep it in a book?

A. No, sir.

207. Didn't you have any book; you kept no book of these horses, selling and buying?

A. No, sir, we settled up every load.

116 208. And threw it away?

A. Yes.

209. So that nobody but you could know what you paid for them: was that it?

A. That was it, we didn't want any one to know.

210. Tell the jury what kind of horses you bought at McGuffey?

A. Well, they were good horses.

211. I didn't ask you that; what horses?

A. Thirteen head of horses.

212. Tell the jury what age they were.

A. Oh, well, horses from five to ten, eleven, twelve years old.

213. What weight?

A. Run from 1400 to 1500 pounds.

214. What color were they?

A. All color-.

215. What were all colors in horse flesh?

A. Well, greys, browns, roams, every color and all kinds of color.

216. Well, you will get more than thirteen if you are not careful. Were they thirteen colors of horses?

A. Oh, I don't know.

217. Well, now, when did you last see the ten horses loaded at St. Marys?

A. Well, I saw them at McGuffey. I untied them in the car and took them out in the yard and turned the others in and drove them back——

218. You are answering as to McGuffey and I asked you as to St. Marys.

Mr. Geer: I object.

Judge Wolfe: Now, answer that question.

A. When I last saw them?

—. Yes.

117 A. I saw them at McGuffey—oh, when I last saw them at St. Marys? I saw them a day or so before they were shipped.

219. Was it a day or so before?

A. It might have been. I will say a day and it might have been in the forenoon.

220. Were they all delivered on the same day, the ten horses?

A. I think they were.

221. What day of the week?

A. I think it was on Thursday and I think they were there the day before shipment.

222. Have you any record of that, of any of the money you paid out?

A. No, sir.

223. Have you not your bank book and returns of checks you paid out there?

A. No, sir.

224. You had to pay money?

A. Yes.

225. You did not have the checks in return of bank settlement?

A. Why, yes. We took them up every time we loaded.

226. But you turned your book for settlement to the bank and it was returned to you balanced?

A. Sometimes they gave us book and sometimes just slip of paper.

227. At any rate you checked on the bank?

A. Yes.

228. You say you have no knowledge where the checks are that were honored and returned or where the book is or the account in any way as to bank return?

A. No, sir.

229. When did you last see this bank settlement with your bank?

A. Somewheres between seven and eight days ago.

118 230. What bank did you draw your checks on?

A. Sometimes on one and sometimes on another.

231. What for those ten horses at St. Marys?

A. Well, I don't know whether I checked on the St. Marys bank or Galion bank.

232. You know what bank you checked on for the thirteen horses at McGuffey.

A. Yes, I think I checked on the Kenton bank.

233. When you saw the ten horses last at St. Marys a day or more before they were shipped where did you go?

A. From St. Marys?

—. Yes.

A. I went on to McGuffey to take in those horses.

234. Had you bought them before that time?

A. Yes.

235. How did you go there, by rail?

A. Yes, sir.

236. Did you see the ten horses again that you had bought at St. Marys?

A. Yes.

237. When did you see them?

A. I saw them on Thursday evening about four o'clock.

238. And where?

A. At McGuffey.

239. Where were the thirteen horses that you bought at McGuffey when you saw these ten horses at four o'clock?

A. They were at McGuffey.

240. In some barn?

A. I had them in an old stable there.

241. When were they loaded, those you had at McGuffey?

119 A. Right away.

242. When you saw those ten horses you bought at St. Marys, as you stated, and met them at McGuffey had you any criticism as to their condition that there was anything wrong with those ten?

A. No, sir, they were all right.

243. Now, at what time did you load these horses at McGuffey, the thirteen?

A. I loaded them right away after the train got in there between four and five o'clock.

244. Did you load them?

A. Yes.

245. Anybody else help you?

A. I had a couple of boys to help me and Mr. Smith was there. He came through with them and helped too.

246. What boys helped you, your boys or the railroad boys?

A. No, some boys we got around the barn there.

247. You then had twenty three horses in the car?

A. Yes.

248. When did you leave there?

A. Well, sir, after I got them loaded there was a train pulled in about six o'clock, took them out and I had three more horses in another car I was shipping home, and they put two cars on the train, and I came right home with them to Marion.

249. What became of the twenty three horses?
A. I got to Marion about nine o'clock in the evening with them and they said they would not get out until the next day.

Judge Wolfe: I didn't ask that and I ask to have it taken from the jury.
Motion sustained.

250. Now, when did you leave the car of twenty three horses and where?
120 A. I left them at the Marion yards nine o'clock that night.
251. Where did you go?
A. I went home.
252. How long did you stay there?
A. Until Friday night twelve o'clock, took the train and went to Buffalo.
253. What day was it when you put the thirteen horses in at McGuffey?
A. I put them in Thursday evening about five o'clock.
254. And that's where you last saw them: is that right?
A. No, sir.
255. You last saw them at Marion?
A. I did not see them at Marion; it was too dark.
256. Did you see the cars they were in at Marion?
A. No, sir.
257. So that you last saw them at McGuffey?
A. Yes.
258. That was what day?
A. On Thursday, about five o'clock.
259. And you next went to Buffalo on Friday, what time?
A. Friday night, twelve o'clock.
260. When did you again see those horses?
A. I saw them on Sunday morning about half past four o'clock.
261. Where were they?
A. Why, they were bringing them down the alley to put them in the barn.
262. What time did you get to Buffalo?
A. I got to Buffalo the next morning, Saturday morning, about eight o'clock.
263. Did you ride over the Erie?
A. No, sir.
121 264. What road?
A. Lake Shore and Big Four.
265. But when you came down on your other trip from St. Marys to McGuffey you rode on the Lake Erie & Western and Erie?
A. No, sir, McGuffey is on the Erie.
266. But you rode those two roads, did you not, to get down there?
A. Yes.
267. Now, when you saw these horses coming down the street in Buffalo, who had them in charge?

A. The Crandall Horse Company's men.
268. How many horses did they have?
A. There were twenty-three horses.
269. Leading them along?
A. Leading them along.
270. Was there anything the matter with them there?
A. Yes, sir.
271. Now, state what was the matter with any given horse.
A. Well, there was one horse, a brown horse or mare that died on Sunday. Fortunately I sold her before she died.
272. You fortunately sold it before it died?
A. Yes, and others lamed and bruised up.
273. I didn't ask you that, but take the horse that died and describe its condition as you found it when you first saw it.
A. Well, it was sick.
274. How soon after it was sick did you sell it?
A. I sold it that forenoon.
275. Now, give us another horse—what time did that one die?
A. Well, sir, it died on Sunday morning about eight o'clock.
276. And you sold it on Saturday?
A. Saturday afternoon I sold it.
122 277. Describe another horse that was injured there.
A. Well, I can't just describe the colors. Nearly all of them bruised up——
278. I didn't ask you about nearly all but another horse. How it was injured and tell its color.
A. I don't know as I can do it particularly.
279. Can you do it generally that horse, its color?
A. No.
280. Now, tell the jury what injury that horse had.
A. No, they were bruised——
281. No, not horses that were bruised, and I ask that answer be taken from the jury.

Motion sustained.

282. What was the matter with that horse?
A. Which?
283. I don't mean horses but a horse.
A. Well, there were different ones.
284. I didn't ask you about different ones, but a horse.
A. Because I didn't make any minute *or* the horse.
285. I didn't ask you about a minute or an hour. Fix a horse in your mind and tell what was the matter with that horse, not the brown one, that's dead, but the next one.
A. Why, as I told you before, they were all bruised up and I told you that two or three times.

Judge Wolfe: I ask to have that argument taken from the jury.
Mr. Geer: We insist that was an answer.
The Court: He says in general terms they were all bruised and so forth. Of course, this was a long time ago, but he is asked to

designate what was wrong with this horse and that and so on. The jury might conclude when he gets through he was not so badly injured and this is to find how they were injured.

123 Judge Wolfe: I don't want an answer to a question I did not ask.

286. I am going back to that second horse you have in your mind that was injured.

A. I don't have any in my mind.

287. Don't you know of a horse that was injured excepting the one that was sick that you sold?

A. Why, I can tell you there was a lot——

288. No, I asked you for one.

The Court: Were they all injured alike?

A. No, different ways.

The Court: Tell how each one was injured.

A. Well, some of them were bruised on the leg——

289. Wait a minute! Tell us of a horse that had an injury and describe that injury, and I don't care what you call him, brown, black or what.

A. One horse was bruised on the foreleg, scarred right up and some of them were bruised——

290. Some of the legs do you mean of that horse? You say one horse bruised on the foreleg, scarred and stratched up, which foreleg was it?

A. The right foreleg.

291. Now, was the left foreleg bruised any?

A. I suppose it was.

292. Was it?

A. Well, sir, I have told you they were all hurt more or less, nearly all of those horses and I can not define any one horse in particular.

293. No, I didn't ask you that and I object to your running on and answering questions I do not ask. You have described the left foreleg.

124 A. I described the right one.

294. Was there anything wrong with the left foreleg?

A. I can't remember.

295. Was there anything wrong with the hind leg?

A. I think there was.

296. Not what you think, but was there?

A. I don't remember in particular.

297. Was there any part of that horse that you remember of an injury on?

A. I can't remember.

298. Well, go to another horse. We have one dead and one injured in its right foreleg. Now, name another horse and you describe the injury to that third one.

A. Well, sir, I have told you they were badly bruised up, skinned up generally.

299. But take that third one.
A. I don't know whether three or four.
300. Well, the third one in your mind. Was the third horse skinned and bruised?
A. I have given you an answer.
301. I will ask you, sir, to answer that question.
A. I will not answer your question.

Judge Wolf: I appeal to the Court that the witness answer my question.

A. I said generally those horses were all bruised up.

The Court: If you wish to recover in this case, you should be frank and give the jury the information you have.

A. I have tried to.

The Court: Of those horses and each one of those. The jury may conclude you are right about this and may conclude you are wrong, and if you can not tell it you lose that much.
125 A. Well, I have said they were all bruised and I can not distinguish the horses, seven or eight years ago and tell what blemishes, their color and all that.

The Court: The burden of the proof is upon you and you must show the difference in value caused by the injuries and what those injuries causing the difference in value you are supposed to recover on. If you can not tell what was wrong, causing the difference in value——

A. I have told what was wrong with them. They were shipped to death on the road.

Judge Wolfe: Your Honor, we ask to have that taken from the jury. Motion sustained.
Judge Wolfe: The court's colloquy is no part of the evidence.
The Court: No.

302. Now, Mr. Stone, I am trying to get a description of a horse, and you have described two, one dead and one injured in his right foreleg. Now, I want a description of another horse you have in mind and how it was injured, one other horse.
A. Well, I don't know as I can just recollect where the injuries were on all the horses. There were so many of them I couldn't do that.

Judge Wolfe: I was not asking for that answer and I ask the court to take it from the jury.
The Court: It is all right for the witness to answer why he can not give an answer to a civil question.

303. Well, do you mean that the jury must know more about this than you do now?

Objected to; ob. sustained.

304. Now, notwithstanding the diff-culty I am still insisting that you describe the third horse.

A. I told you as well as I could.
126 305. You can not do it, can you?
A. No, sir.
306. Can you tell what you paid for the horse that was injured in its right foreleg?
A. No, sir.
307. Nor you can't tell what you sold it for?
A. No, sir.
308. And you don't know whom you sold it to?
A. No, sir.
309. Did you keep any record of the sales of those horses at all?
A. The Crandall Horse Company kept a record.
310. They have a record?
A. They are supposed to make them.
311. They were your commission men down there to sell these horses?
A. Yes.
312. Don't you have any of them here to tell?
A. Why you have them here, you sent down there and got them.

Judge Wolfe: I didn't ask that, your Honor, that is improper.

313. I asked you don't you have a record or person from the Crandall Company to tell what that was?
A. We did.
314. Have you here today?
A. No, sir.
315. You will have before the case is over with, won't you?
A. I don't know; depends upon how long the case will take.
316. Let us go to the next lot of the 20th of March, 1907. How many horses were there in that shipment?
A. Twenty two.
317. Where did you buy them?
A. Some at St. Marys and some at Kenton.
127 318. Who were the buyers at St. Marys?
A. I and Mr. Smith and I don't mind whether I bought any or not in that load. Mr. Noble was there buying some horses.
319. Did you buy any at Kenton?
A. Yes, sir.
320. Did you pay for any of the horses bought at St. Marys?
A. I paid for all, I think.
321. How many bought at St. Marys?
A. I think eleven head bought there.
322. How much per head did you pay for them?
A. I couldn't say for that.
323. If you paid there, dodn't you have any idea of the amounts per head?
A. Not now.
324. You couldn't even guess at it?
A. No, sir.
325. Well, do you know how much you got for these horses per head at Buffalo?

A. No, I couldn't tell just what we got at Buffalo—something like——

326. If you don't know, you need not tell.

A. Not in my mind just now.

327. What you did get you had reported from your commission merchants there?

A. Yes.

328. They would know, for anything you know, how much you got there for them?

A. Yes.

329. How many did you put in at St. Marys of that load?

A. Eleven head.

330. How many at Kenton?

128 A. Eleven.

331. Was the car held at Kenton for taking on those eleven head?

A. Yes.

332. What day of the week were they brought in at St. Marys, eleven head?

A. I think they were brought in, possibly on Tuesday; I would not be sure about that or Wednesday.

333. Were they brought in the barns to remain for shipment?

A. Yes.

334. Were you there when they were brought in?

A. I believe I was.

335. And saw the horses?

A. Yes, sir.

336. When you saw them were they all in the barn?

A. Yes, sir.

337. You saw them on Tuesday—did you help to load them?

A. No, I did not.

338. Where did you go next?

A. I went to Kenton.

339. Did you go there by rail?

A. I went by railroad, yes.

340. Now, how many of the Kenton load did you buy?

A. I bought them all.

341. What was done with the Kenton horses prior to loading, were they brought in?

A. Yes, they were brought in in the morning.

342. How much did you pay on those horses, down payment, each of them?

A. As I did on the others, from $2.00 to $5.00 a head.

343. Did you help to load those eleven at Kenton?

A. Yes, sir.

129 344. When you loaded those did you see the eleven that came from St. Marys?

A. Yes.

345. Loaded in the same car?

A. Yes.

346. Erie car?

A. I think it was.

347. Was the second load in an Erie car or a Lake Erie & Western?

A. I think they were in an Erie car.

348. What time of the day were those cars loaded at Kenton?

A. Well, it was along about seven or eight o'clock at night.

349. That was on the Lake Erie & Western before it struck the Erie?

A. No, sir, that was on the Erie. Kenton is on the Erie railroad.

350. They were loaded first at St. Marys on the Lake Erie & Western and at Kenton they were loaded on the Erie road.

A. Yes.

351. On the same car?

A. No. At Kenton they were loaded on the Erie.

352. And shifted from one car to another?

A. No, sir, the car pulled in there on a train and I had these horses and it was decided we should put them in the same car.

353. That eleven were in and eleven more went in the same car and went on to Buffalo?

A. Yes.

354. When those eleven horses were seen at Kenton loaded at St. Marys, were they all right?

A. Yes, sir, they were tied in the car and I went in and unloosened them and turned the rest of the horses in.

355. And they were all in loose then?

A. Yes.

130 356. Where did you see them last?

A. I went with them to Marion, got there about nine o'clock at night and they laid there until the next day and I went home.

357. Did you go on the car with that load?

A. As far as Marion.

358. Did you pay any fare yourself?

A. No, sir.

359. That was part of your contract, you could ride?

A. Well, they will carry a man in charge. I don't know whether all billed out that way.

360. The bills will show?

A. Yes.

361. When they left Kenton were the horses in about the shape you bought them?

A. They were in good shape then.

362. Where did you go after you went to Marion?

A. I walked about a mile and a half through the yards to Marion and took the Big Four train home.

363. Did you ever see those twenty-two horses again?

A. I saw them at Buffalo.

364. When?

A. Next Saturday afternoon, about half past two o'clock.

365. And when they got to Buffalo were you there when they were unloading them?

A. I was not at the car.

366. Where were you when you saw them?

A. Well, sir, I was right at the Crandall House and right in front of that house and they came right past there, and I followed the horses to the barn.

367. Now, were there any horses there that were lame?

131 A. Yes, several horses.

368. Now, describe one horse that was lame and injured.

A. Well, a grey mare lame and head all bruised up, and her eyes all bruised up, and there was a black mare——

369. No, no. Keep to that grey mare. Now, that was a grey mare the first one?

A. Yes, sir.

370. And where was she bruised; state particularly?

A. Well, it would be pretty hard for you to put your hand down on her where there was not a bruise.

371. Well, where wasn't there a bruise?

A. Well, I don't know.

372. Did you try to put your hand down to find where there was not a bruise?

A. Not very much.

373. Did you try to find where there was a bruise?

A. Well, I had some hands working on them.

374. No, I am asking you what you saw, to describe about that grey mare.

A. All swelled up, eyes bruised and swollen and leg like that.

375. What leg strained?

A. Hind and forelegs.

376. All four legs strained?

A. Yes.

377. And its eyes and head swollen?

A. Yes, sir, eyes swollen shut.

378. Are you certain they were clear open when you left them at Kenton?

A. I didn't see anything of them.

379. But there at Buffalo you will swear to the jury they were closed up?

132 A. Yes.

380. Was there any other horse in that shipment that the eyes were closed up?

A. There was a grey mare in the same condition.

381. This was a grey mare you have just described.

A. Black I said.

382. No, you said grey.

A. Well, there was a black mare also.

383. In the same condition as the eyes?

A. Same all over.

384. What is the all over of that black mare?

A. Well, all over she had skin off and the hair was tramped off the skin.

385. Well, the railroad company didn't tramp it?

A. Why, they came pretty near it. It looked like they had run the cars over them.

386. Was it tramped over and run over by the cars?

A. Well, it looked to me like they were thrown down in the car and they were tramped over.

Judge Wolfe: I ask to have that answer taken from the jury. Motion overruled; deft. excepts.

387. State what else you saw on the black?

A. Well, there would be places on the body where just raked off like that right down.

388. How many such places?

A. Well, I couldn't say but there was enough.

389. How many?

A. I didn't count them.

390. How many were enough?

A. Well, the hair was pretty near raked off of her I can tell you that.

133 391. Do you know how much that horse cost you?

A. Not exactly.

392. Do you know how much it sold for?

A. I could not say. I think——

393. No, not what you think, do you know?

A. I would not say just now because I can not remember.

394. Do you know how much the grey horse cost you?

A. No, sir.

395. Or what it sold for?

A. No.

396. Mr. Stone, I hand you "Defendant's Exhibit A," and call your attention to the signature there at the bottom, which is pretty near erased. Can you see?

A. I can see part of it, and "F" there and that is about all.

397. What are Mr. Stone's initials?

A. H. M.

398. And your initials?

A. H. M., that's me.

399. I call your attention to the signature on the back of it.

A. J. T. Smith.

400. You know his signature?

A. I am not positive about that, and I don't know as I ever saw it many times, and, of course, it has been a good while ago.

401. Well, you think it is his signature?

A. I think it is his signature.

402. Do you know anything about the signature under it?

A. I don't know anything about that.

403. On the bottom, if you will look at that closely, that looks like Smith there.

A. I think it is. It is an "S" to start with.

134 404. That is his signature there?

A. Very likely, I think it is the signature; very likely his.

405. This is the first shipment, Exhibit A, the 10th month and 10th day, 1906——

Objected to.

406. This is October, 1906, that is the date the first shipment was made?

A. Yes.

407. There was not any other shipment made that day?

A. No, sir.

408. Tell the jury how near that time any other shipment was made over the Erie.

A. I couldn't tell you.

409. Probably not within eight or ten days at any rate?

A. No, sir.

410. Now, I show you "Defendant's Exhibit B," and there is "Stone." That is your own signature; perhaps it is very dim?

A. I think that's my signature, yes.

411. What is that on the back of Defendant's Exhibit B?

A. That is my signature.

412. That is dated March 6th, 1907. That was the day of the second shipment?

A. Yes.

413. Was there any other shipment that day?

A. No, sir.

414. Nor there was not any other shipment within a few days of that either way?

A. I don't think so.

415. I show you now "Defendant's Exhibit C"; is that your signature?

A. That's Mr. Smith's signature.

135 416. Now, this on the back of Exhibit C, tell us what signature is there, the first one.

A. I think that is the third load and I will say it must be Smith's writing, it is not mine.

417. Now, that word is "Stone"; do you notice that?

A. Well, he probably signed my name to it.

418. Oh, yes, was he accustomed to signing your name occasionally to those papers?

A. Whenever we wanted him to.

419. He had authority to sign it occasionally that way?

A. Yes, in making a shipment, he had, if we asked him, to load horses.

420. And this was on the 20th of March, 3-20-1907: that was the third shipment?

A. Yes. I put in the horses at Kenton and came on to Marion.

421. There was no other shipment on that day?

A. No, sir.

422. Smith is the man, the name of the man to these papers here, is the man that helped buy the horses on commission as you have testified to?

A. Yes, sir.

423. And Noble is the one you have named as your partner in business at that time?

A. Yes, sir.

424. Now, the road that runs through Lima is called The Chicago & Erie, is it not, that the horses were shipped on?

A. Not as I know of. It was the Erie Railroad, is all I know about it.

425. Is it not known as the Chicago & Erie: have you ever heard of that?

136 A. I don't know, Erie railroad is all I know of.

426. You never heard of the Chicago & Erie, did you?

A. Not that I can recollect; always call it Erie Railroad.

427. Well, I asked you if you have ever heard of The Chicago & Erie Railroad and I am not asking you about the other.

A. I don't believe I did.

428. And you didn't know there was a Chicago & Erie going through Kenton?

A. No, sir.

429. You thought it was the Erie that went through Kenton?

A. Yes, sir.

430. Now, does it not connect with the road at Marion they call the Erie?

A. Well, they have two branches.

431. Kenton is on the branch that leads to Chicago, whatever railroad it is?

A. Yes.

432. Is there any other railroad leading from Marion to Chicago than what you call the Erie?

A. No, sir.

And upon redirect examination, by Mr. Geer; as follows:—

Q. 1. Mr. Stone, in your cross examination, you made an answer to a question asked you by Judge Wolfe something about a brown mare that died. In what shipment was that brown mare?

A. In the March 6th shipment.

2. When did that March 6th shipment arrive at Buffalo?

A. Half past four o'clock Sunday morning.

3. If I understood you right, you stated you sold that horse on Saturday afternoon.

A. If I did, I made a mistake; it was Sunday morning I sold it.

137 4. How did you sell the horse?

A. A fellow just came along and looked at her and I sold to him.

5. That was the brown horse?

A. Yes, sir.

6. Now, I will ask you what effect the skinning up of the knees of the horses, as you described to Judge Wolfe, has upon their market value?

Objected to.

The Court: Just tell what they were worth in the market after they arrived at their destination.

7. How long has it been since these transactions occurred?
A. Well, it was in 1907 and it would be seven years ago; very near seven years ago.
8. You say in one of these exhibits that they have shown you it bears your signature.
A. Yes.
9. Defendant's Exhibit A, I believe; I now hand you that exhibit and ask you if that is the one that bears your signature?
A. (Examining it) No, sir, my signature is not on that.
10. Well, I hand you Defendant's Exhibits B and C, and ask you to select either one that has your signature upon that you testified to.
A. This is the one, "Defendant's Exhibit B," that has my signature.
11. Now, I will ask you, Mr. Stone, to state to the court and jury when and under what circumstances and where you signed your name to that paper.
A. I signed it at St. Marys.
12. And how did you come to sign it and under what circumstances?

Objected to.
The Court: I have already held for this paper that it is proper in rebuttal.

Objection sustained; pl'ff excepts.

138 13. I will ask you at whose suggestion did you sign it?

Objected to; ob. sustained for same reason; pl'ffs except.

14. Did you sign more than one?
A. No, sir.
15. In your examination in chief I exhibited to you "Pl'ffs' Exhibits A, B and C," being photographs of the sixteen horses shipped from St. Marys to Martel, and I now ask you to state when they were taken.
A. They were taken, I should say, the 9th day of October, the day before we shipped.
16. Where were they taken?
A. They were taken at Mr. Smith's place at St. Marys.
17. Where is that taken?
A. They are of the sixteen horses shipped to Mr. Noble's place at Martel.
18. What do you say as to their being correct or incorrect photographs of those horses; whether they are correct representations of those horses?

Objected to; ob. overruled; def't excepts.

A. They are correct representations of those horses; yes, sir.

19. Do you know what record the Crandall Horse Company keeps or did keep in these transactions, and have you had any access to it?

A. I have no access further than they make us out a statement after the horses are sold. They keep a record in their books.

20. Have you a statement of that kind?

A. No, sir.

21. Have you had one?

A. I suppose there was at the time.

22. And do you know where that is?

A. I am not sure but Barker has it.

139 23. Who is Mr. Barker?

A. He was attorney in the case.

24. When tried before?

A. Yes, before.

25. Well, have you a statement?

A. No, I have not.

26. Of any of the two loads?

A. No, sir.

27. How long has it been since you saw it?

A. Well, I have not saw it since the time of the other trial.

28. Was there a statement of that kind in evidence here at the last trial?

A. I think there was a copy taken at Buffalo from the books there.

29. Was it presented at the trial by the way of deposition, or do you know?

A. I think by way of deposition.

And upon recross-examination, by Judge Wolfe; as follows:

Q. 1. Where were these "Pl'ffs' Exhibits A, B and C" taken?

A. They were taken right back of Mr. Smith's barn in the pasture.

2. Were you there?

A. Yes.

3. When they were taken?

A. Yes, sir.

4. And when was that taken, Exhibit A?

A. Well, I think they were taken during the 9th of October.

5. No, I asked you as to this Exhibit A.

A. At that time.

6. The 9th of October, 1906?

A. Yes.

7. I hand you "Pl'ffs' Exhibit B," where was that taken?

140 A. They were all taken at the same place.

8. You were there all the time?

A. Yes, sir.

9. Who took these pictures of these roadsters?

A. Well, sir, I couldn't tell you. Mr. Smith is in the room and he can tell you.

10. You don't know?

A. He got somebody from town to take those pictures.

Mr. Geer: You don't mean Mr. Smith is in the room now?
A. No, sir, this forenoon he was here.

11. When did you see statements like that or Defendant's Exhibits A, B and C, the day these shipments were made?
A. I seen one of them the day it was made, and that is the only one I seen.
12. Which did you see, A, B or C?
A. This is the one, Exhibit B.
13. Well, now, are you sure that this one is the one you signed, maybe somebody else signed your name to it?
A. That is my signature.
14. How do you know that you signed is not some other shipment of them—well, you did sign them on their shipment, didn't you?

Objected to; ob. overruled; pl'ffs excepts.
The Court: He may answer the last shipment.

A. Why, you have to sign them. They won't take the goods without you sign them.
15. Every time you ship, you mean to say that?
A. Sure thing.

Mr. Geer: Why do you say you have to sign them?
A. They won't take the goods.
The Court: It is what he had to do in this particular matter and I say that is not proper at this particular time.

141 Also CHRISTIAN ZILLER, who, being duly sworn, upon direct examination by Mr. Geer, testified, as follows:

Mr. McBride: He is the same man who testified before?
Mr. Geer: Yes. Are you willing to use that testimony?
Mr. McBride: We are willing to use it subject to the rule as to competency and reserving our rights.
Mr. Geer: I will go ahead and examine the witness.

Q. 1. Where do you live?
A. I live at Caledonia.
2. What's your name?
A. Christian Ziller.
3. What is your business?
A. Veterinary surgeon.
4. How long have you been in that business?
A. In the neighborhood of 45 or 50 years.
5. In what vicinity do you practice, doctor?
A. In what vicinity?
—. Yes.
A. Well, Marion, Morral and Crawford.
6. Now, doctor, in the year 1906 during the month of October, where did you reside?
A. At Martel.
7. Did you then practice veterinary surgery?

A. Yes, sir.

8. Now, I will ask you during that month did you transact any business for, or were you called to attend any horses for Clark Noble?

A. Yes, sir.

9. When was that?

A. Well, it was in 1906, along I think in October.

10. And where did you then live?

A. In Martel.

142 11. How near did you then live to the cattle chute or unloading place for stock there?

A. Oh, possibly within 75 or 100 yards.

12. Do you have any knowledge of a shipment of horses being unloaded there by Mr. Noble?

A. Yes, sir.

13. Now, state, if you can, when that was.

A. Well, it was in 1906, I think in October.

14. How many horses were there?

A. Well, I didn't count 'em. They were a carload.

15. What time of the day was it they were unloaded?

A. In the evening.

16. Did you know or examine the condition of these horses?

A. Well, I helped to unload them and I heard the racket.

17. What did you do?

A. Why, I just walked over there and they were getting them out of the car as best they could.

18. You may describe their condition.

A. They were in bad condition.

Motion to take answer from jury; motion sustained.

19. Now, doctor, did you examine each of these horses?

A. Oh, no.

20. Did you make a general examination of them?

A. Well, I observed them, and I doctored two of them that was ailing.

21. How long did you doctor the two ailing horses?

A. Well, one in the neighborhood of six months.

22. What was the matter with that horse?

A. His stifle cap was knocked out of place.

23. And when was your attention first called to that horse?

A. That night.

143 24. Where?

A. At Martel.

25. Where did they take those horses?

A. Well, they took them to Clark Noble farm.

26. How far is that from Martel?

A. I could not tell.

27. About how far?

A. Oh, possibly two or three miles.

28. Did you visit them at the barn afterwards?

A. Yes, sir.

29. You stated you examined and treated one with a stifle cap knocked out of place?

A. Yes.

30. Did you doctor any others?

A. Yes, sir, there was two of them hurt in the stifle.

31. Besides the one with the stifle cap knocked out of place?

A. Yes.

32. Describe their condition.

A. Well, they were in bad condition.

33. Just describe the particular injury.

A. Why, lame.

34. What caused the lameness?

A. The stifle cap being dislocated.

35. Did you notice any of the other horses of that shipment other than you have testified to?

A. Yes, sir, one was hurt in the front knee.

36. Describe that injury to the jury.

A. Well, it was bruised and enlarged.

37. What about the skin being broken?

A. Oh, the skin was knocked off in different places off of nearly all of them more or less.

144 38. Now, that is the fourth one of them. Mr. Ziller, do you have in your mind any other horses of that shipment that had any other particular ailment or injury other than you have already described to the jury?

A. I didn't examine the whole carload; I only examined and worked on the horses that was designated to me.

39. How many of that shipment of horses designated to you and how many did you treat?

A. I did not count them, but four of them I did treat.

40. How long did you treat them?

A. Oh, well, there was some horses that I treated in the neighborhood of six months.

41. From your experience as a veterinary surgeon what would you say as to those injuries having been recently received by those horses when you were called out there, do you mind whether they were fresh or old?

A. Why, they were fresh.

42. Now, in addition to the horses you have described their particular ailments, what, if any, ailments did you notice with others of that shipment?

A. Oh, they were naturally bruised and shrunk; looked as though they had been badly handled.

Motion to take answer from jury; motion sustained; pl'ffs except.

43. I will ask you, doctor, whether or not there was any horses in that shipment that were not bruised or that were free from bruises or cuts or scratches or ailments when they were unloaded.

Objected to; ob. overruled; def't excepts.

A. Well, they were in a manner nearly all scalped one way or

another either upon their hips or sides or their heads as though they had been jammed and bruised by something.

145 Motion to take answer from jury; motion overruled; deft. excepts.

44. Doctor, what effect will it have upon a horse where he has been a long time without feed or water?
A. Why, he would naturally shrink.
45. Do you mean by shrink, lanky?
A. Yes, sir, lanky.
46. What was the appearance and condition of these horses as to that?
A. Why, they looked very lanky.

And upon cross-examination, by Judge Wolfe, as follows:

Q. 1. Doctor, do you keep a record of your visits and services as a veterinary?
A. No, except when I get a stand-off, I keep a record of that.
2. Didn't you keep a record of these horses?
A. I did not keep a record because he paid me.
3. When paid up you don't keep a record?
A. No, I do not.
4. Did you keep a record of your attention to these horses at Martel?
A. I kept a record in my head.
5. Did you keep a record on paper?
A. No, sir, because I didn't need it.
6. Wait a little bit. How long did you treat the longest of those horses that were hurt there?
A. In the neighborhood of six months.
7. And yet you kept no account against Stone or account of what treatment you were giving them?
A. I didn't need to.
8. Well, did you?
A. No, sir.
146 9. Now, how many horses did you give treatment to?
A. I think four.
10. Do you know where these horses were hurt, at what places?
A. Well, two of them hurt in the stifle.
11. No, do you know what the condition of those horses were when put in the car?
A. No, I was not there.
12. And if they had not been fed in the barn before they were put in the car, they would get lanky?
A. They possibly had——
13. No, would they not get lanky if they had not been fed in the barns before they were shipped as much as they would fail to feed them en route: is not that so?
A. It is customary——
14. Just wait, not about custom, the question I ask is the question of being lanky and a horse would get lanky because not fed.
A. Yes.

15. And sometimes because they are sick?
A. Yes.
16. Do you want to say that you never kept any account on any book of these horses; can you remember how much Stone and Noble paid you for the treatment you gave them?
A. No, sir, because——
17. We don't care for the cause, but do you know?
A. I have no record because——
18. Wait a little bit. I am not asking you about a record, but I am asking you do you know, in your mind, how much Stone and Noble, or anybody, paid you for the treatment of these horses?
A. No, sir, I don't.
19. Do you know whether they paid you anything or not?
147 A. Why, I think they did.
20. Now, did they pay you anything?
A. Yes, sir.
21. And you don't know how much—do you know when?
A. Each trip that I made.
22. Every time?
A. Every time I went to look at these horses they paid me the charges.
22. How much did they pay you each day that you went up there?
A. I don't just know, but it would depend a good deal——
23. No, do you remember how much they paid you the first time you went up there?
A. The first time?
24. The first time you went up to see those horses?
A. It depends on the number. The trip would be $2.00.
25. I asked you if you can tell the jury from recollection how much they paid you per trip?
A. It depended on the amount of medicine.
26. I asked you how much they paid you per trip, not the amount of medicine?
A. No, sir, I can not remember.
27. You don't remember what medicine you gave?
A. Well, I couldn't.
28. Did you give the medicine internally or rub it on?
A. Some internally and some on the animal.
29. You gave a little both ways?
A. Yes.
30. And you don't remember how much you gave them in your treatment or how much they paid you or how much each time?
A. They paid me for each trip.
148 31. No, I asked you how much and you don't know, do you?
A. No, sir.

And upon redirect examination, by Mr. Geer; as follows:

Q. 1. Doctor, you may explain to the court and jury why you say you have no record of this transaction.

Objected to; ob. overruled; deft. excepts.

A. Because these trips were all paid cash. I keep no records nor make no charges of cash trips.

2. Just quitting when they paid you and that was the end of it?

A. Yes, sir.

3. Now, the question was put you by Judge Wolfe, that you did not know what their condition was when put in the car by the conductor, but, doctor, if those horses had been well fed before they were put in the car at St. Marys, and came through from St. Marys to Martel in a reasonable manner, what would you say then as to their being in that gaunt, lanky condition you found them in?

Objected to the reasonable manner stated in question; ob. sustained.

4. Doctor, if those horses were fed before they were put on the train at St. Marys, which is probably sixty miles from Martel, and came directly through to Martel, what would then cause the gaunt look that you described about it?

Objected to; ob. overruled; deft. excepts.

A. Well, they should not have been in that condition.

5. What would have caused that condition if they had been well fed before being loaded at St. Marys?

A. Well, that condition would not have been.

6. Let me put this question: If those horses were fed well before they left St. Marys and they were on the road for thirty six hours and when they arrived at Martel they were in the condition you have described as to being shrunk and lanky, as you call
149 it, and gaunt, what would have caused it?

Objected to; ob. overruled; deft. excepts.

A. Well, I would say ill treatment and a want of water and feed.

Mr. McBride: We ask that the answer and each part of the answer be taken from the jury.

Motion overruled; deft. excepts.

Judge Wolfe: How much ill treatment?

A. Neglect to feed and water and it is hard to tell. I was not with them, but the condition the horses were in showed the condition of treatment.

Mr. Geer: Showed the condition of what, doctor?

A. The condition of treatment.

By Judge Wolfe:

Q. 1. Doctor, you treated the longest horse six months; now, your treatment of the next longest how much?

A. Well, possibly for that time.

2. You treated them until cured?

A. Well, I couldn't cure them; I could relieve that lameness to a certain extent, but they were never cured and couldn't be.

3. You would have them to keep lame?
A. No.
4. Stuck to it a good while, not being able to cure them?

Objected to; ob. sustained.

Mr. Geer: I now call Mr. Smith and will examine him a little out of order as he lives at St. Marys and desires to go home.
The Court: Very well.

Also J. T. SMITH, who, being duly sworn, upon direct examination, by Mr. Geer, testifies, as follows:

Q. 1. What is your name?
A. J. T. is my initials, Smith.
150 2. Where do you reside?
A. St. Marys, Ohio.
3. How long have you lived in St. Marys?
A. For about 52 years.
4. What business were you in — 1906 and 1907?
A. I have been in the stock business all my life.
5. What do you mean by that?
A. Handle all kind of stock, hogs, cattle, calves, sheep and horses.
6. Do you know H. M. Stone and Clark Noble?
A. Yes.
7. Did you ever do business or work for them any?
A. I have bought some horses on commission for them, yes.
8. Let me call your attention to a shipment of horses made from St. Marys to Martel in the month of October, 1906; do you know anything about that?
A. They were took in at my place then and shipped from there, I think.
9. Who bought those horses and where were they purchased?
A. In the country there, Mr. Stone and Noble bought most of them and I bought some of them for them.
10. Let me hand you photographs, our Exhibits A, B, and C, and you may look at them and state whether you know what they are.
A. I will have to put my glasses on. Yes, I think they were taken at my place.
11. I will ask you whether those are true photographs of those sixteen horses?
A. Yes, sir, they are.
12. And with reference to the time they were shipped from St. Marys when were those photographs taken?
A. Well, they were taken the day before they were shipped from there.
151 13. Describe the class or quality of those sixteen horses.
A. They were very good horses.

Motion to take answer from jury; motion sustained.

14. Make it a little more specific. Describe them as to class and kind.

A. Well, they were good, big horses. What they look like now, I couldn't tell you. That has been several years ago and I have bought a thousand of horses since then.

15. I will ask you if those photographs are true.

A. Yes, sir, they were taken at the time.

16. Where were those horses shipped to?

A. To Martel.

17. And when?

A. Oh, about—what time are you speaking of now?

18. The Martel shipment, where loaded?

A. St. Marys.

19. Who loaded them?

A. I did.

20. What time of the day?

A. If I am not mistaken, around four o'clock in the afternon.

21. What became of them after they were loaded?

A. They were sent to Lima and from there they took the Erie to Martel.

22. Now, Mr. Smith, who went with them?

A. I went with this load of horses myself.

23. What time did they leave St. Marys?

A. I think around four o'clock in the afternoon.

24. What time did they arrive at Lima?

A. Probably a little after night, probably seven o'clock or so when we got to Lima.

152 25. What time did you leave St. Marys?

A. I went on the same train with the horses; I stayed on top of the car.

26. What was the condition of these horses when they were loaded and left St. Marys?

A. They were all right; in good shape and all good horses.

27. Did you examine the horses and look them over at Lima?

A. Well, the best I could. I saw them through the car as well as I could and that was all. They were set on the transfer and it was dark quite a little bit after they got to Lima.

28. How were they loaded? I mean as to being tied in the car.

A. I think, if I am not mistaken, they were tied.

29. Did you give them any particular attention at Lima?

A. Why, I went and saw them and done as well as I could for them.

Motion to take last part of answer from jury; motion sustained.

30. Now, then, Mr. Smith, when did they get out of Lima; in fact, were they switched at Lima?

A. They were switched on a transfer track right across from the depot; probably a hundred yards from the depot.

31. How long did they remain there?

A. They stayed there until eleven o'clock the next day.

32. And what time did they get to Lima?

A. I should say around seven and maybe eight o'clock, but just a little after dark.

33. And what time did they get out of Lima?

A. Eleven o'clock or around eleven o'clock the next day; I couldn't say exactly what time.

34. Did you have any talk with the Erie agent at Lima as to this shipment of horses?

A. Yes, sir.

153 35. You may state what he said as to when that shipment would leave Lima?

Objected to; ob. sustained; pl'ffs except.

36. On what kind of a train were they brought out of Lima?

A. On a local train.

37. On what kind of a car were they loaded at St. Marys?

A. They were in a common stock car.

38. Did you accompany the train that had this car in it from Lima to Martel?

A. Yes, sir, I did.

39. Did you see the carload, the shipment of horses, from time to time along the road?

A. Yes, sir, at almost every station, because they stopped at every station and switched the car around, switch cars in, take cars on and put some off and every station stopped a little bit and I always got out and looked at these horses.

40. What condition did you find them in in the switches?

A. In pretty bad condition.

Motion to take answer from jury; motion sustained.

41. Describe particularly what effect that switching had on these horses.

A. Well, when you have them on a train of that kind——

Objected to; ob. sustained.

42. On this train what effect did it have upon these horses, this switching around, as you have described, what happened to the horses as a result?

Objected to; ob. overruled; def't excepts.

A. Well, they were hurt a good many of them, skinned up some and I couldn't tell just how, but while in the car the train knocked them backwards and forwards in the car and the car not being full, it would hurt them more or less.

154 Motion to take answer from jury; motion overruled; def't excepts.

43. How frequently did that switching around that you have described occur to this car containing these sixteen horses from Lima to Martel?

A. At every station and I don't know how many that is, but I don't think that we went through a station without stopping and shifting these horses around and switching cars in and out.

44. What effect did that have upon these horses at the other station?

Objected to.

The Court: Were you speaking of one station or more?

A. More than one. Of course, I got out of the caboose at every station and went to see these horses and to see what they were doing and how getting along.

Objection sustained.

45. When did you arrive at Martel?

A. About four o'clock the next morning or something around there. It has been so long ago I can't remember all of these things.

46. How long were you on the road?

A. I think left Lima along eleven o'clock that day and the next morning I was in Martel along four or five o'clock.

47. I mean from the time you arrived at Lima until you arrived at Martel.

A. I arrived at Lima sometime in the evening, about seven o'clock and the second morning after that I was in Martel at four o'clock.

48. State what, if any, feed or water was furnished that shipment of horses from the time it left St. Marys until it arrived at Martel.

A. None I don't think there was that I know of.

49. If there had been feed or water furnished to them, would you have known of it?

Objected to; ob. overruled; def't excepts.

A. Why, I surely would.

155 50. Now what do you say as to there being any furnished?

Objected to; ob. overruled; def't excepts.

A. I don't think they had anything to eat or drink.

51. What do you say as to their having been fed just before being loaded at St. Marys?

A. Well, they were fed before loaded at St. Marys.

52. How long before?

A. Well, the noon before they were loaded along towards four o'clock they were fed.

53. Now, when they arrived at Martel did you notice their condition?

A. Why, it was dark when unloading in Martel, and you couldn't see so very much about them but all scarred up that you could see and what I seen afterwards I seen them after it got daylight.

54. Where were they then?

A. They were taken down to Mr. Noble's place and I suppose they got there along eight o'clock that day or maybe half past eight.

55. Mr. Smith, I will ask you if you can particularly describe the injuries that you noticed on any of these particular horses, and describe them by color or designate them and then describe the particular injuries that you saw.

A. Well, I couldn't do that, not now any more. I could have at the time, but I wouldn't undertake to do that now because I couldn't do it correct.

56. Have you any other reason that you can not do it now?

A. No, sir, I have no other reason, but I have had a good many horses since that time and I was only there a short time at Noble's until I came home, and as the horses did not affect me.

57. You had no interest in the horses?

A. No, sir.

156 58. State what condition you found them in.

A. Well, they were all in bad condition when unloaded there, as bad condition as they could be.

Motion to take answer from the jury; motion sustained.

59. Now, Mr. Smith, I wish you would be as specific as you possibly can in describing the injuries you found on any of these horses.

A. Well, several of these horses were lame but how badly they were hurt I can't remember now; probably a half a dozen of these horses lame and they were skinned up all over, quite a good many of them.

60. You may state, if you know, whether any of these horses were down in the car during the time of shipment.

A. Well, they were knocked off their feet a couple of times and I saw them, but they did not stay down in the car.

61. What was their condition when they were loaded as to being lame or skinned up?

A. They were all in good condition.

62. Were there any of them lame?

A. No, sir.

63. Or skinned up?

A. No, sir.

64. Any of them bruised?

A. No, sir.

65. What railroad passes through St. Marys?

A. The Lake Erie & Western.

66. By what railroad were these horses shipped from Lima to Martel?

A. The Erie.

67. How long did you remain at Martel?

A. I think I got there in the morning and left about eight o'clock in the afternoon. Mr. Noble brought me to Galion and I came home, that's the way I remember it now.

157 Mr. Geer: I would like to examine this witness about the signatures to these papers, but from your rulings it would be out of rule. He lives at St. Marys and desires to return there.

The Court: Very well. Proceed with it.

68. Before going to that I have something else to ask. Did you give any assistance to Stone and Noble in the purchase and loading of a carload of horses at St. Marys on or about March 6th, 1907?

A. Well, I helped to load most of their loads when they loaded down there, but as to the time I can not tell exactly.

69. Let me call your attention to a load that you accompanied as far as McGuffey, in which there was some other horses put on.

A. Well, I remember that I came to McGuffey with a load of horses, but I couldn't tell you when it was or anything about it to amount to anything now.

70. Your relations with the firm of Stone and Noble, have they been anything other than buying on commission?

A. No, sir.

71. Do you recall the condition of that second carload of horses that you accompanied as far as McGuffey?

A. I think they were all right, in good shape until there.

72. Describe the class and kind of horses they were.

A. They were pretty good horses, the most of them I think.

73. In what way did they come?

A. Well, they came the same road, the Lake Erie & Western and then over the Erie.

74. How long did that second carload of horses lay over at Lima?

A. I couldn't tell you.

75. How long were you coming from St. Marys over to McGuffey?

A. I don't believe I can tell.

76. How far is it from St. Marys to Lima?

A. Twenty miles.

158 77. How far from Lima to Marion?

A. Well, I would not know exactly; around seventy miles I would think.

78. How far from Marion to Martel?

A. Well, I don't know; I should think around twenty miles, I am not sure.

79. Now, I hand you paper, marked "Def't's Exhibit A," and ask you to examine the paper, particularly the signature on the lower end and the signature on the back of that paper.

A. This one below here is mine, I think.

80. And where and under what circumstances did you sign it?

Objected to.

The Court: Under the circumstances I will allow him to testify subject to exceptions.

Objection overruled; def't excepts.

A. I signed it in the office. I signed it in the Lake Erie & Western people's—at St. Marys.

81. What information did the agent at St. Marys give you as to the contents, or what information did you have as to the contents of that paper?

A. None whatever.

Motion to take answer from jury; motion overruled; def't excepts.

82. How was it presented to you and by whom?

Objected to; ob. overruled; def't excepts.

A. Well, I don't know whether it was presented to me by the agent there, and of course, he got me to sign it and that is all they ever do at our station there. I have shipped a good many hundred loads from there and they would write out the bill and I would sign the bill and that is the end of it.

83. State, if you know, in what part of the station the bill is made.

159 A. Well, it is in the Clerk's desk.

84. Is the clerk's desk separated from the place where you signed?

A. No, sir.

85. How is it handed to you or presented to you for your signature?

A. Well, I generally go right in the clerk's office and stand by the table and he fills out the bill and I sign it and go on.

86. I will ask you at this particular time in the signing of this bill what information was given to you as to its contents by the agent, or any person?

Objected to; ob. overruled; def't excepts.

A. None at all.

87. Why did you sign that bill you signed J. T. Smith?

Objected to; ob. overruled; def't excepts.

A. Well, we are asked to sign all the bills when we ship any kind of stock.

Motion to take answer from jury; motion overruled; def't excepts.

88. I will ask you if that was the reason you signed this bill?

A. Yes, sir.

89. I now hand you "Def't's Exhibit C" and ask you whose signature that is at the bottom of that paper.

A. That's prety hard to tell the way it is torn out here, but it looks like mine.

90. Look on the back of that. Did you ever put your signature on the back of that?

A. No, sir.

91. Mr. Smith, let me ask you to state what, if any, authority you had from Stone & Noble, or either of them, to make any contract in the shipment of these horses?

Objected to; ob. overruled; def't excepts.

160 A. None whatever. None. They would tell me if they had a load of horses to ship out and they were not there, tell me to ship those horses out and that was all that was said to me.

92. What, if any, information was given you by the agent at the time you shipped these horses as to there being more than one freight rate?

Objected to as leading and generally; ob. overruled; def't excepts.

A. I shipped stuff for a good many years and I never knew there was more than one rate.

The Court: That was not asked you but what was said.

A. There was nothing said, nothing said about rates.

Mr. McBride: We move to take from the jury the last answer before the answer he made to the court.
Motion sustained.

93. What, if any, information was given to you by the agent as to there being two rates at the time you made the shipment and signed this paper?

Objected to; ob. overruled; def't excepts.

A. I did not know there was two rates.

Motion to take answer from jury; motion sustained.

94. What information was given to you by the agent, or by the railroad company?
A. None whatever.
95. I will ask you what knowledge you had when you signed this paper as to containing a limited liability clause?

Objected to; ob. overruled; def't excepts.

A. None whatever.
96. And what is true as to the one is that true of each paper you signed that has been exhibited here?

Objected to; ob. overruled; def't excepts.

A. Yes, sir.

161 Motion to take last three answers from jury; motion overruled; def't excepts.

And upon Cross-examination, by Mr. McBride:

The Witness: Gentlemen, I would like to have you get through with me as I positively have to go home tonight; I have got important business that takes me home and I have to go.

Q. 1. Very well. You have been in the station there at St. Marys a good deal?
A. A good many times.
2. Did you ever notice a sign there in there like the one I show you, "Def't's Exhibit F"?
A. No, sir, I never did. I paid no attention.
3. Did you ever see that sign in there?
A. No, sir.
4. Or anything like that?
A. I don't know that I ever have.
5. Will you say you did not?
A. Well, I don't know that I ever did.
6. That is as strong as you will put it?
A. I don't think I ever did see it.

7. Anything calling your attention to the fact that there were tariffs on file with the company?

A. They have a good many bills tacked up around there, but I didn't pay any attention. I just went in and shipped without paying any attention.

8. Without paying any attention to what was tacked up on the walls there?

A. I would not be apt to read all the bills they have tacked on the walls. I am generally in a hurry.

9. But you knew there were things tacked up, but you
162 paid no attention?

A. There might have been.

10. Didn't you say a moment ago that you paid no attention?

A. I said I saw things tacked up around the wall there, but I did not pay any attention to them.

11. Now, you shipped a great deal of stock out of St. Marys?

A. Yes, sir, many years.

12. And when you ship them out, you sign the paper?

A. Yes.

13. And if you accompanied the stock, that paper gave you permit to ride with the stock, didn't it?

A. Well, no, not necessarily. I went with a good many loads of stuff and I never had any papers.

14. But the bill of lading was there?

A. The conductor probably had the bill of lading, but I didn't.

15. The livestock contract was signed up?

A. Yes, I signed the contract up but our people at our station would very seldom offer me a contract.

16. When you would go on another load how did you do?

A. Well, I never had any trouble going any place without a contract. I never went over many roads, but I don't think I was asked for a contract on any road.

17. Did you ever have a contract?

A. Yes, I have had a few contracts, but very few.

18. Now, this car was brought up from St. Marys to Lima?

A. Yes, sir.

19. Did you ever notice the engines on the Erie road, what they have on them?

A. No, sir.

20. Did you ever ride in passenger cars on that division?
163 A. Very seldom; a few times.

21. Did you ever notice it say "The Chicago & Erie" on the road between Marion and Lima?

A. I never paid attention to that.

22. Didn't you know it is The Chicago & Erie between Marion and Lima?

A. It probably is, but I can't tell you.

23. Did you ever hear it called that?

A. No, sir, I don't know as I have.

24. Don't the Erie begin at Marion?

Objected to.

Question not pressed.

25. Now, you accompanied this freight car from St. Marys to Lima and from Lima to Martel?

A. Yes.

26. You say the horses were not fed?

A. No, sir, I don't think they were.

27. Didn't you ask that they should not be fed?

A. No, sir, I did not.

28. At any time or at any place?

A. No, sir.

29. Did you have any conversations about feeding?

A. No, sir.

30. You did not ask anybody to feed them?

A. No, sir.

31. You were accompanying the stock?

A. Yes, sir.

32. And you didn't ask a single person from the time you left St. Marys to Martel to feed the stock?

A. No, sir, I didn't.

164 33. Now, the next shipment you only accompanied it as far as McGuffey?

A. I accompanied the shipment to McGuffey.

34. And there some additional horses were put in?

A. Yes, sir.

35. And you then left it at McGuffey?

A. Yes.

36. I don't understand that you came on to Marion with it?

A. No, sir.

37. You went back home?

A. Yes, sir.

38. Now, the third shipment, did you accompany them any distance?

A. No, sir, I don't think I went anywhere with it; I don't think I did; I don't remember.

39. Do you remember loading the third shipment?

A. As I told you before I load most of the horses Stone and Noble loaded at St. Marys; I think all they ever did load there.

40. Did you sign Mr. Stone's name to one of these contracts?

A. I don't know whether I did or not.

41. Does it look like your writing?

A. I didn't notice as to that.

42. Let us look at the exhibit.

A. I think that Mr. Stone's name is there. I signed it myself.

43. Look at our exhibit C and see if you signed that.

A. I couldn't say whether I did or not.

44. Does it look like your writing?

A. I don't know that.

45. Well, when you got these three exhibits, A, B and C, you did not ask the agent to make any changes in these exhibits?

A. No, sir.

165 And upon redirect examination, by Mr. Geer, as follows:

Q. 1. Were these contracts, "Def't's Exhibits A, B and C," given to you at the time when you made the shipments?
A. I don't think so. No, sir.
2. What became of these after you signed your name to it?
A. Well, the agent kept them. He always kept them.
3. You did not see them?
A. I don't think I did and I don't think I had any of them in my possession.
4. Did you know their contents?
A. No, sir, I did not.
5. You keep a large barn and sales stable?
A. I have a barn; yes, sir.
6. What is the fact whether Stone and Noble loaded from your barn?
A. They always took in their horses and loaded from my barn, yes, sir.
7. Now, you stated in answer to a question Mr. McBride put you that you did not ask anybody to feed the stock, and now you may answer why you did not.

Objected to; ob. overruled; def't excepts.

A. Well, I had asked a good many times before to have my stock fed and every time——

Motion to take answer from jury; motion sustained.

8. No, but this particular case.
A. Well, this particular time I did not because I thought there was no use.

Motion to take answer from jury; motion overruled; def't excepts.
Motion to take last clause of answer from jury; motion overruled; def't excepts.

9. Why did you think it was no use?

Objected to; ob. sustained.

166 Mr. Geer: We now offer in evidence photographs, our Exhibits A, B and C, and our Exhibit D, the statement or bill.
Judge Wolfe: We object to their being offered altogether.
Objection sustained.
Mr. Geer: The freight agent delivered that to the Crandall Horse people.
The Court: Offer the photographs primarily and separately.
Mr. Geer: We now offer photograph, "Pl'ffs' Exhibit A," in evidence.
Objected to; ob. overruled; def't excepts.
Mr. Geer: We now offer photograph, our Exhibit B, in evidence
Objected to; ob. overruled; def't excepts.
Mr. Geer: We now offer photograph, our Exhibit C, in evidence.
Objected to; ob. overruled; def't excepts.

Said three photographs so offered admitted in evidence, hereto attached, marked "Pl'ffs' Exhibits A, B, and C," respectively, and made a part of this bill of exceptions.

Mr. Geer: I now offer in evidence this statement, or bill, identified by the plaintiff in the case, our Exhibit D, in evidence.

Objected to.

The Court: The railroad company has not been connected with that in any testimony yet, and I will have to sustain the objection. He got that from a third party.

Objection sustained; pl'ffs except.

Mr. Geer: I would like to further examine Mr. Stone.

Objected to; ob. overruled; def't excepts.

Also HENRY M. STONE, who, upon further direct examination, by Mr. Geer, testifies, as follows:—

Q. 1. Mr. Stone, you testified yesterday?

A. Yes, sir.

167 2. Concerning these horses?

A. Yes.

3. And I will ask you to state whether or not there was any freight charges paid on either one of the shipments you made to Buffalo, New York?

A. Paid here?

4. Paid anywhere?

A. Yes, sir, they were all paid.

5. And where was the freight paid?

A. Paid at Buffalo, New York, by the Crandall Horse Company.

6. How much was paid?

A. I can not say just to the dollar. Something like $67.00 I believe it was from where we shipped them.

7. Is that for the two shipments?

A. For the one shipment.

8. Which one?

A. Well, it would be either one, the same thing.

9. How much freight was paid for the two shipments?

A. I think it would be $3.00 a head more for extra horses in one load. Where over twenty horses they charge additional.

10. Now, what other charges, if any, did you pay on either or both?

A. Paid the feed charges.

11. How much was that?

A. I paid to——

Objected to.

The Court: Unless he paid it to the railroad company, I don't think you can charge the railroad company.

12. Well, to whom was this freight and feed charges paid?

A. Why, it was paid by the Crandall Horse Company out of my money to the railroad company.

Motion to take answer from jury; motion sustained; pl'ff excepts.

168 Mr. Geer: We except and except to prove, if answer were permitted, that they paid freight charges and feed charges together through the Crandall Horse Company to the Erie Railroad Company.

13. Now, I will ask you, Mr. Stone, what was the means and the method and the custom at that time, and what did you do with reference to paying the freight and feed charges to the Erie Railroad Company, and how did you pay it.

Objected to.

The Court: He has already said he has not paid any to the railroad company. I will sustain the objection.

Mr. Geer: I do not understand that he said he didn't pay anything to the railroad company.

The Court: The record shows he paid somebody else other than the railroad company.

Objection sustained; pl'ff excepts.

14. Let me ask you, Mr. Stone, what did you pay to the Crandall Horse Company?

Objected to; ob. sustained; pl'ffs excepts.

Mr. Geer: We expect to prove, if the answer were permitted, that he paid for the plaintiffs to the Erie Railroad Company through the Crandall Horse Company——

Judge Wolfe: He should not be permitted to state aloud his offer of proof in the presence of the jury.

The Court: Yes, you should comply with the rule, Mr. Geer.

Mr. Geer: I was not stating it aloud and it would be impossible to follow all the suggestions of Judge Wolfe.

15. Mr. Stone, who is this Crandall Horse Company?

A. It is a firm in Buffalo, New York, doing business under the firm name of the Crandall Horse Company, selling horses on commission, a commission firm there.

169 16. Were they the ones that sold the shipments of horses for you?

A. Yes, sir.

17. Now, in shipping horses over the Erie Railroad Company to the Crandall Horse Company at New York, I will ask you whether or not there was any freight charges by the railroad for that shipment, and paid to the railroad company.

Objected to; ob. overruled; def't excepts.

A. Yes, paid by me.

The Court: Yourself.

A. Not personally.

18. Now then, what do you mean by "not personally"?

A. Well, I mean that I paid the Crandall Horse Company, or they took it out of my money and paid the Erie Railroad Company.

Motion to take answer from jury; motion sustained; pl'ffs except.

19. In shipping horses to the Crandall Horse Company over the Erie Railroad Company and making your settlement, was it customary and usual for the Crandall Horse Company to take into consideration in their settlement with the shipper to deduct therefrom the railroad charges for freight and feed?

Objected to; ob. sustained; plffs. excepts.

20. I want to ask you, Mr. Stone, what would be the usual time for a shipment of horses, or a reasonable time instead of usual time, for shipment of horses by freight expeditiously from St. Marys, Ohio, to East Buffalo, New York?

Objected to; ob. sustained pl'ffs excepts.

21. What would be a reasonable time for a shipment of horses over the Erie Railroad from Lima, Ohio, east to Buffalo, New York?

Objected to; ob. sustained; pl'ffs except.

22. Are you able by your experience to state what the usual or reasonable time would be for a shipment of horses from Lima east to Buffalo, New York?

Objected to; ob. sustained; pl'ffs except.

170 Also CLARK NOBLE, who, being duly sworn, upon direct examination by Mr. Geer, testifies, as follows:—

Q. 1. State your name to the jury.
A. Clark Noble.
2. Where do you live?
A. I live in Morrow County west of Iberia on a farm.
3. How far from Martel?
A. About three miles from Martel.
4. How long have you resided there?
A. I can't tell because I can't remember exactly, something like forty years.
5. You lived there in 1906 and 1907?
A. Yes.
6. Are you one of the plaintiffs in this case?
A. Yes, sir.
7. Do you know the location of the Erie Railroad with reference to the city of Lima and through the various towns to the eastern border of the State of Ohio?
A. Yes, sir, I have been over the road quite often.
8. What principal towns in Marion County does it run through?
A. Through Marion, Caledonia, and Galion in Crawford.
9. Any other places in Marion County this Erie road runs through—what about Martel?
A. It runs through Martel. That's a small town.
10. I will ask you whether or not the Erie Railroad Company takes freight or is a common carrier of freight and livestock?

A. Yes, sir.
11. And was it in 1906?
A. Yes, sir.
12. In 1906 what business were you engaged in?
A. Shipping horses.
171 13. Did you buy any?
A. Yes.
14. Did you buy horses in that community?
A. Well, we bought at St. Marys, New Bremen and Ft. Recovery, Lima, Ohio, and in Indiana, all through that country.
15. I call your particular attention to a shipment of horses from St. Marys, Ohio, to Martel, Ohio, which was shipped on or about the 10th of October, 1906, and ask you if you recall such a shipment.
A. Yes, sir.
16. I will ask you if you had anything to do with the purchase of the horses?
A. Yes, sir, I helped to buy them.
17. And where were they purchased?
A. They were purchased around St. Marys and New Bremen.
18. And where were they shipped from?
A. They were shipped from St. Marys, Ohio.
19. To what point?
A. To Martel.
20. To whom?
A. To Clark Noble.
21. That was you?
A. Yes, sir.
22. How many horses of that shipment?
A. Sixteen horses.
23. Where were you when those horses were loaded for shipping?
A. I was at St. Marys, Ohio.
24. What part did you take in the loading of them, if any?
A. Well, I helped to load them in the car. Helped to load up into the car.
25. Describe just how you loaded them.
172 A. We lead them up to the shute and put them in the cars.
26. How were they stationed in the car, tied or untied?
A. I believe we tied them in the car.
27. Did they have halters on them?
A. I am not sure. They had halters on them when they came in.
28. I mean when you put them in the car.
A. They had halters on them.
29. What about tying them?
A. I don't mind if those horses were tied or not.
30. What kind of a car was it you loaded these horses on?
A. I believe it was an Erie horse car.
31. What would you say as to the condition of the car?

Objected to.

Mr. Geer: Under their general denial we want to show the condition of the car was all right.

Mr. McBride: No claim made in the petition.

32. Very well. I will not press it. What was the condition of the horses when you loaded them. What kind of horses were they?
A. They were good, heavy draft horses, fancy stock.
33. Now talk out so all those jurors can hear you. When were they loaded on these cars at St. Marys?
A. They were loaded in the afternoon.
34. Do you know when they left St. Marys?
A. No, I don't; I came home.
35. And who gave instructions for the shipment of this shipment of horses?
A. I told Mr. Smith——

Mr. McBride: We object to that.

36. Who gave the shipping instructions for this load of horses?

Objected to; ob. overruled; def't excepts.

A. I did.
173 37. To whom did you give it?
A. To the agent.
38. Who was the agent?
A. I don't mind his name.
39. I will ask whether a man named Zerby was the agent?
A. I think it was, yes.
40. What instructions *give* you give him about shipping these horses?

Objected to; ob. overruled; deft. excepts.

A. I told him to ship them to Martel and Mr. Smith would come with them.
41. Is that all the instructions you gave him?
A. Yes, sir.
42. I will ask you what, if any, information you received from the company, or what, if any, knowledge you had or received at that time from the railroad company or from any of its agents as to shipping at a reduced rate of freight?

Objected to.
The Court: I am inclined to think that is more proper in rebuttal; that you are anticipating their defense.
Objection sustained; pl'ffs. except.

43. Did you see this car leave St. Marys.
A. No, sir.
44. What time did you leave St. Marys?
A. I don't mind just what time, I started in the evening.
45. Have you had any experience in shipping carloads of horses from St. Marys to Martel? Had you ever shipped any horses from there to Martel before?
A. I believe we had some before.
46. Are you able to state what would be the reasonable time in

which a carload of horses, such as you have mentioned, could be shipped from St. Marys to Martel, Ohio?

174 Objected to; ob. sustained; pl'ffs except.

47. When did you arrive home?

A. I arrived home along in the night some time. I don't mind just what time I got to Martel.

48. I will ask you whether you had any information as to when these horses would arrive at Martel from any agent or officers of the company?

Objected to; ob. sustained; pl'ff excepts.

49. When did you next see this shipment of horses?

A. The next morning.

50. What do you mean by the next morning, the next morning after they were shipped from St. Marys?

A. Yes, sir, I came to Martel after them and brought four men along to lead them home and no horses came there.

51. How long did you remain there?

A. Until the next day.

52. And until what time?

A. About four o'clock in the morning.

53. And then what occurred?

A. The horses came at that time.

54. Now, what do you mean, Mr. Noble, by next day: how long was that after you had left St. Marys?

A. That was about thirty-six hours later.

55. Now, who did you have there to assist you in unloading the car?

A. I had the McNeil boys.

56. Give their names.

A. I am trying to think their names. There was Fred Wren, Bacheler, and the McNeil boys, and I can't think of the other boy's name. There was four of them.

57. What, if anything, did you do with reference to the freight charges on that load of horses at that time or any time?

175 A. I believe I paid the freight charges to Mr. Sypher, the agent.

58. Agent where?

A. Martel.

59. When?

A. After they were unloaded.

60. That same day?

A. Yes.

61. Did you go to the car?

A. Yes, sir.

62. Did you help unload them?

A. Yes, sir.

63. You may describe the condition in which you found those horses in the car.

A. They were all standing quiet when we found them.

64. I didn't ask you about standing but their condition?
A. Well, I couldn't tell that until they were unloaded.
65. How then, were they tied or loose in the car?
A. They were loose in the car when they came to Martel.
66. Immediately after they were unloaded I ask you to tell this jury the condition in which those horses were then and describe as specifically as you can now recall.
A. Well, they were all used up, in pretty bad shape.

Motion to take answer from jury; motion sustained.

67. That is general, make it specific and tell how they were used up as you have mentioned.
A. Well, there was one roan horse had its eyes all bandages up, his forelegs cut up, in pretty bad shape.
68. You have described the roan horse you have mentioned in your petition. Did you have a chestnut sorrel horse?
A. We had one black horse got hurt and two chestnut sorrel horses.
176 69. What was their condition?
A. This black horse had the cap of the hip knocked off and the hocks were bruised and swollen up and bruised about the head some.
70. What about his legs?
A. I think his legs were all right except the hock was swollen and bruised.
71. You have alleged in your petition about a horse injured in the right foreleg. Describe that.

Objected to as leading; ob. overruled; def't excepts.

A. We had one dapple grey horse got hurt in his right foreleg.
72. Describe that injury.
A. Well, he got his leg cut in some way and I don't know how that was done, and it was bruised up and cut across the fore arm of his leg, badly swollen.
73. Now, what will you say about the black horse you had in that shipment?
A. Well, he had his leg swollen and had his hock joints all banged up behind.
74. What do you mean by banged up?
A. Well, they were swollen up and bruised.
75. Was there a bay horse in that shipment?
A. Yes, sir.
76. What was his condition?
A. Well, he had his eyes and head banged up and pretty sore looking.
77. What about his leg as to lameness?
A. He was a little lame in front where he got crippled.

Judge Wolfe: That is very leading, your Honor.
The Court: O, that is not leading.

78. Now, Mr. Noble, I will ask you to describe other than what

you have already done any other horse and any other particular injury to a horse in that shipment that you can now recall.

177 A. We had a couple of chestnut sorrel horses that got hurt in the stifle joint; their stifle joints were out of place and they couldn't walk without being badly lamed.

79. Now, the condition of the rest of the sixteen horses other than those you have specifically described when you unloaded them?

A. Well, they looked gaunt and tired.

Motion to take latter part of answer from jury; motion overruled; def't excepts.

81. Now, Mr. Noble, do you know, or have you had experience sufficient with a horse, to tell what would cause them to look gaunt and tired?

Objected to; ob. overruled; def't excepts.

82. They were on the road——

Objected to.

83. Have you had an experience sufficient to say that?

A. Yes.

84. Now, state what made these horses look gaunt and tired as you have described, what, in your opinion?

Objected to; ob. overruled; def't excepts.

A. It had been quite a while since they loaded them and they stayed on the cars quite a length of time on the road.

85. What do you mean, was — the loading made them tired or what?

Objected to; ob. overruled; def't excepts.

A. To stay on the road so long makes them very tired and shrunk.

86. What about the feed or water?

A. I don't know anything about that. I was not with them.

87. What will you say from the appearance of these horses, what is you opinion from the appearance of these horses at the time you unloaded them as to whether or not they had been fed or watered during the time they were en route?

178 Objected to; ob. overruled; def't excepts.

A. Well, they were so near famished when I got them home I couldn't give them all the water they wanted, give them a couple of swallows every time so that they would not drink too fast and be overcome.

Motion to take answer from jury.

The Court: The objection ought to be made sooner and I will allow the answer to stand.

Motion to take answer from jury overruled; def't excepts.

Question 87 here read to witness.

Objected to; ob. overruled; def't excepts.

The Court: Do you understand that question?
A. I just answered it, I believe.
The Court: No, you did not.

A. What is it?

The Court: From the appearance of these horses when they arrived at their destination, what would you say as to whether they had been fed or watered in transportation?
Mr. McBride: We object to the Court's question.
Ob. overruled; def't excepts.

A. I don't know; I was not with them.
88. What is your opinion about it?

Objected to; ob. overruled; def't excepts.

A. I can not tell whether they were fed and watered or not.
89. Now, Mr. Noble, I will ask you whether or not there were any charges of the company for feed for the transportation.

Objected to; ob. overruled; def't excepts.

A. There were no charges for feed.
90. Now, Mr. Noble, I will ask you whether or not the condition you have just described of these horses, as you found when you unloaded them at Martel, existed when you loaded them at St. Marys?
A. No, they were in good shape when loaded at St. Marys.
179 91. But what was the condition of the horses when loaded then?
A. The condition of the horses was all right.
92. Now, I will ask you to state to the jury what the market price of this shipment of horses was at Martel on the day you received them if they had been received in good condition?

Objected to.
The Court: Do you make the objection on account of qualification?
Mr. McBride: Yes, and knowledge of the market.
The Court: Qualify him.

93. How long have you been purchasing horses in and around the vicinity of Martel prior to 1906?
A. I worked at that business since I was twenty-one years old.
94. And have been living there buying and selling horses?
A. Yes, sir.
95. Were you at that time acquainted with the market prices of horses in and around Martel, Ohio?
A. Yes, sir.
96. Now, I will ask you to state what the market price of this shipment of horses was at Martel on the day which they were received, if they had been received in good order?

Objected to; ob. overruled; def't excepts.

A. $270.00 around.

97. What do you mean by around?
A. Worth that much apiece.
98. Now, I will ask you to state what was the fair market price of these horses at Martel on the day on which they were received by you and in the condition in which they were when received.
A. I believe $200.00.
99. I now show you "Pl'ffs' Exhibits A, B and C" and ask you to look at them and state what they are.
180 A. They are the horses we shipped from St. Marys, Ohio.
100. Where, to what place?
A. To Martel, Ohio.
101. You say these are the horses?
A. Yes.
102. What do you mean?
A. Well, those are the same ones.
103. You mean the pictures?
A. Yes, they are the pictures of those horses.
104. Were you present when the photographs were taken?
A. Yes.
105. And with reference to the time the horses were shipped, when were they taken and where?
A. They were taken back of Mr. Smith's barn out in the lot there, I believe.
106. How long before they were loaded?
A. I believe they loaded them the next day.
107. Were any of those horses when you received them at Martel in a condition such as they required the services of a veterinary?

Objected to; ob. overruled; def't excepts.

A. Yes, sir.
108. How many of them were in that condition?

Objected to; ob. overruled; def't excepts.

A. They were seven of them that he doctored right along and some of the others were bruised up, some about the head and eyes and the body.

Motion to take answer from jury; motion overruled; def't excepts.

109. Who was the veterinary surgeon?
A. Dr. Ziller.
110. The gentleman that testified here yesterday?
A. Yes, sir.
181 111. Can you state how long he attended those horses?
A. Well, about six months.
112. Are you acquainted with a man by the name of James Bailey?
A. Yes.
113. What is his business?
A. He buys horses and ships them to New York.
114. Where does he reside?
A. Mansfield, Ohio.

115. Is he the gentleman who was here in attendance yesterday?
A. Yes, sir.
116. I will ask you to state when with reference to the receipt of this shipment of sixteen horses to Martel you saw him.
A. He came to our house a couple of days afterwards.
117. And where were the horses then?
A. In my barn.
118. Do you know how it came about he came there?

Objected to; ob. overruled; deft. excepts.

A. He same to see the horses to buy them.
119. At the time Mr. Bailey came to your place were these horses in your barn?
A. Yes, sir.
120. And at the time Mr. Bailey came to your place were there any other horses in the barn?
A. No, sir.
121. How long was it after you received the shipment that Mr. Bailey came there?
A. Two days, I believe.
122. Who was in charge of the horses?
A. When they were shipped?
123. No, when Mr. Bailey came to see them?
A. I was; I was taking care of them.
182 124. I will ask you whether any of those horses had received any injuries from the time you took them off the car at Martel up until the time that Bailey saw them,
A. No, sir.
125. Did you assist in buying the shipment of horses that were shipped to Buffalo, New York, from St. Marys, Ohio, on or about March 6th, 1907?
A. Yes, sir.
126. Where were you when that shipment was made from St. Marys?
A. I was at St. Marys.
127. How many horses did you put into the car at St. Marys in that shipment?
A. I think there were 21 or 22, something like that.
128. Were they all put in at St. Marys?
A. I think they put some in there and some at another town. I am sure. I did not go there with them.
129. Do you know how many they put on the car at St. Marys?
A. About half of them I believe.
130. And what kind of a car were they loaded in?
A. I don't mind.
131. Over what road were they to be shipped and to where?
A. They went to the Crandall Horse Company at East Buffalo, New York.
132. Over what railroad?
A. Over the Lake Erie & Western and the Erie Railroad.
133. The Lake Erie & Western from St. Marys to what point?

A. They went to Buffalo.
134. I know, but over what road?
A. Over the Erie railroad.
135. How far did they go over the Erie railroad?
A. From Lima, Ohio, to Buffalo.
183 136. What was the condition of those horses that were loaded at St. Marys?
A. They were all right.
137. What do you mean by all right?
A. They were all sound, good horses.
138. What class of horses?
A. They were some chunks, some of them draft horses; chunks is what we call them.
139. Describe to the jury what you mean by chunk?
A. Full made strong horses that will do to go to the Boston market.
140. Were you at Buffalo during the sale of those two shipments?
A. No, sir.
141. Did you help load the third shipment?
A. Yes.
142. Shipped on or about the 20th of March, 1907, from St. Marys?
A. Yes, sir.
143. Where were you when that shipment was made?
A. St. Marys, Ohio.
144. Who was with you in purchasing those horses?
A. I went out alone and bought horses.
145. Who was Mr. Stone, if you know?
A. Mr. Stone he went and bought some and Mr. Smith bought some.
146. Was or was not Mr. Smith a partner with you?
A. No, sir, he was not.
147. Who helped to load them?
A. Mr. Smith and some hands at his barn helped to load them and I would help a little and do the best I could.
148. Did you after the horses were loaded at St. Marys of either one of those shipments ever see them again?
A. No, sir, I did not.
184 149. I will ask you whether or not you saw any of these three shipments while at Marion and in the Marion yards or at Marion.
A. I see the one load that was loaded that we started out of St. Marys. I seen that at the Marion yards.
150. What load was that?
A. That was the load that went to Buffalo.
151. Well, Clark, two loads went to Buffalo, which one of those do you mean?
A. Well, that was the first load that went to Buffalo.
152. Now, with reference to the load that stopped at McGuffey, which one was it?

A. This was the load that stopped at McGuffey I seen in the Marion yard.

153. And was it the same load that you saw shipped out of St. Marys?

A. Yes.

154. How long after they had been shipped from St. Marys was it that you saw them in the Marion yards, how many days?

A. I don't know just how many hours.

155. Well, about how many?

A. About twenty seven hours.

156. They had been loaded at St. Marys?

A. Yes.

157. And where were they located in the Marion yards?

A. They were down in the Marion yards about a mile and a half this side of depot.

158. Did you at that time notice their condition?

A. Yes, sir, I got out of the car I had went over on and crawled up on the car they were in and looked at them.

159. What was their condition then?

A. They were all right.

185 150. Do you know when they got out of Marion?

A. No, sir.

161. Do you know how far it was from Lima to Marion?

A. I am not sure; I think about sixty or seventy miles.

162. How far is it from St. Marys to Lima?

A. About twenty miles.

163. Did you ever see either of these shipments again?

A. No, sir.

164. Did you make any inquiry of the Marion Erie railroad officials about the shipment of this carload of horses?

A. No, sir.

165. I will ask you to describe the condition of the last shipment of horses to Buffalo at the time you loaded them at St. Marys.

A. They were all right.

166. What do you mean by all right, that does not inform us much.

A. They were all straight and feeling well and good horses.

167. What about any scars or being skinned up or bruised?

A. No, sir, all good class of stuff, good quality.

168. What effect does it have of a horse being skinned up and bunged up upon its selling price in the market?

Objected to; ob. overruled; deft. excepts.

A. It has a bad effect; they can not hardly sell them to anybody; nobody likes to buy a crippled horse.

Motion to take answer from jury; motion overruled; deft. excepts.

Mr. McBride: I move that each and every part of the answer be taken from the jury and also as a whole.

Motion overruled; deft. excepts.

169. I have reference to a horse that is skinned up and banged up and scuffed up, bunged around the eyes, patches of the skin off and the hair torn off of him, what effect does that have on the selling in the market?

186 Objected to; ob. overruled; deft. excepts.

A. It makes it hard to sell them and takes off quite a bit in the price.

Motion to take each and every part of the answer and the whole answer from the jury; motion overruled; deft. excepts.

170. Can you say whether any of the shipment of horses shipped from St. Marys to Martel had been down in the car and tramped on?

A. I don't know.

171. What was their appearance?

A. I was not with the horses and I don't know whether they were down or up.

And upon cross-examination, by Mr. McBride; as follows:

Q. 1. You were there at St. Marys at the first shipment, I understood you to say, and helped to buy those horses in the car?

A. Yes, sir.

2. And part of those horses were shipped from St. Marys and part put on at Kenton, Ohio?

A. I believe we put some from Kenton in one load and some at McGuffey in another load.

3. The Martel horses were partly put on at St. Marys and partly at Kenton?

A. No, we put them all on at St. Marys.

4. You didn't come over with the Martel horses?

A. No, sir.

5. Smith came over with those horses?

A. Yes, sir.

6. I hand you our exhibit A—you know Mr. Smith's signature?

A. No, I do not.

7. Do you know whether that is Mr. Smith's signature, Def't's Exhibit A?

187 A. I would not know; no, sir.

8. You see "Clark Noble" there: is that your signature?

A. No, I don't believe I wrote that.

9. Mr. Smith's name there: is that his signature?

A. Why, that's his name and I don't know whether he wrote it or some one else. I can not tell.

10. You are familiar with his signature?

A. No, sir.

11. Well, he was working for you at the time, wasn't he?

A. Yes, sir.

12. You know he came over with the horses; he was the man in charge of the horses?

A. Yes.

13. Did you ever see this paper before?
A. I don't mind if I did or not.
14. When you shipped horses out of there, you signed a contract out of there, a paper?
A. We often do. That is, they shove paper out and we sign bill of lading.
15. And you had shipped a great many carload- of horses out of there?
A. Well——
16. Out of St. Marys?
A. Yes.
17. And some going to Martel and some to East Buffalo?
A. Yes.
18. And possibly some to other places?
A. Yes, sir.
19. And as you shipped them out of there you signed these papers and these papers were the papers that gave you the right to ship them?
A. They gave us a bill of lading, if I went through with
188 them if I would not get a pass they would give bill of lading and some times would not give us any pass, any contract.
20. The papers you signed you received from them was your right to ship stock; you couldn't ship stock without paper?
A. They make a bill of the stock and often ship it just with the bill, and if you did not go through with it they hardly ever give you a bill of lading.
21. You have to sign something to ship it out.
A. Sometimes we do and sometimes we don't.
22. You notice that this shipment to Martel is signed by Mr. Smith, don't you?

Objected; ob. overruled; pl'ffs except.

A. I don't know who signed it. I see his name there.
23. Well, he was working for you at the time?
A. Yes, sir.
24. And he helped to load these horses?
A. Yes, sir.
25. And he looked after the shipment as made there?
A. Yes, sir.
26. That was true of all three of the shipments?
A. Yes, he always helped us.
27. Where did you say you paid the freight charges of this Martel shipment?
A. I believe we paid it to Mr. Sypher, if I remember right; I am not sure, but I think it was.
28. Wherever it was paid, either at Martel or St. Marys, you paid it without any objection or anything?
A. Yes, sir, we always do.
29. Did you come along with the horses shipped to East Buffalo as far as Marion?

A. No, sir.

189 30. Mr. Smith came with those to McGuffey, didn't he?

A. I think he did; I am not sure about that.

31. Were you at McGuffey when the horses were loaded there?

A. No, sir.

32. But you did happen to see them at Marion?

A. Yes, sir.

33. Now, how many horses did you specifically mention in this Martel shipment as to having some cuts or bruises on them: was it five or six?

A. I believe along there; five, six or seven head were lame.

34. Had all the number, six or seven, been lamed?

A. Yes, sir, bunged up, crippled up a little.

35. How long did they continue to be lame?

A. Well, we had some lame for six months.

36. How many?

A. I believe there were two or three lame that long.

37. You say two or three lame that long?

A. Yes, sir.

38. You were not at Buffalo at all?

A. No, sir.

39. During any of these shipments?

A. No, sir.

40. And you know nothing about them at Buffalo?

A. Not a thing.

41. You never presented a statement in writing to the agent at Martel for any claim for injury to these horses?

A. No, sir, not in writing.

42. Nor made out and sworn to?

A. No, sir.

43. Nor at Buffalo for any of those horses?

190 A. I believe we made a statement at Galion, Ohio.

44. Did you make out a statement in writing and swear to it and present it for these other shipments ?

A. I believe so at Galion, Ohio.

45. When?

A. I don't mind what date it was.

46. Within five days after the shipment?

A. I don't mind about that.

47. Where did you get it or whom did you get to make it.

A. Mr. Barker of Galion, Ohio.

48. At the time you brought the suit?

A. I believe about that time; I don't mind just what time it was.

Mr. McBride: What is the date of the filing of the petition?

Mr. Geer: The petition filed April 13th, 1907, and summons issued on that same day.

49. You say Mr. Barker made that out and you gave it to him?

A. Yes, I believe so.

50. Do you know what he did with it?

A. I don't know, no.

51. So that personally you never made out any writing or swore to it, a claim for damage, for any *of* one of these three shipments, and presented it to the Erie Railroad?

Objected to as not cross examination.

The Court: I think this matter comes in in your case properly.

Mr. McBride: I can put him back and cross examine him later?

The Court: Yes, when your case opens.

Also JAMES BAILEY, who, being duly sworn, upon direct examination by Mr. Geer, testifies, as follows:

Q. 1. State your name to the jury.

A. James Bailey.

191 2. Where do you live?

A. Mansfield.

3. What is your business?

A. Buying and shipping horses.

4. How long have you been in that business?

A. Oh, 17 years.

5. Were you in that business in 1906 and 1907?

A. Yes, sir.

6. Are you acquainted with Clark Noble?

A. Yes, sir.

7. Were you acquainted with him in 1906?

A. Yes, sir.

8. Were you acquainted with his place of residence during that year?

A. Yes.

9. Where was it?

A. West of Iberia, possibly half a mile.

10. Were you at his place or home in the month of October 1906?

A. Yes, sir.

11. While you were there did you see any horses?

A. Yes, sir.

12. Did you notice the condition of the horses that you saw at that time?

A. I did.

13. You may describe to the jury their condition.

A. Well, as near as I can recollect, and of course, it has been 6 or 7 years ago, but they were badly bruised up and very gaunt and showed hard treatment of some kind.

Motion to take last clause of answer from jury; motion sustained; pl'ffs excepts.

The Court: Just state the condition.

192 A. Well, they were bruised about the hock and leg and were very gaunt.

Mr. McBride: We ask that that be taken from the jury because he has testified he did not see them for two days and it is for the jury to determine how much of that is due to the want of feed during the time of transportation.

Motion overruled; def't excepts.

14. Now, you have had considerable experience in buying and shiping horses; have you ever had any experience with horses being on the road for an unusual length of time without food or water?

Objected to; ob. overruled;

Mr. McBride: We object to that because of "the unusual length of time."

The Court: Yes, fix the time in days or hours with the witness.

15. Mr. Bailey, what would you say would be an unusual length of time for horses to be on the road being shipped without feed or water?

Objected to; ob. sustained pl'ffs except.

16. Now, I will ask you, Mr. Bailey, if horses were on the road being shipped without feed or water for a period of thirty six hours, what effect would that have upon them?

Objected to; ob. overruled; def't excepts.

A. Why, it would make them very gaunt.

Motion to take answer from jury and jury be instructed to disregard the answer; motion overruled; deft. excepts.

17. Now, when a horse has become in that condition from those causes I will ask you to state how long the effect or appearances or that gaunt condition will exist after he is taken off the train?

Objected to; ob. overruled; def't excepts.

A. Well, I would answer that by saying a great deal depends on the horse. Some horses would show it positively for two weeks and others possibly not more than 3 to 5 days and some horses
193 after long shipment won't eat for a day or two after being unloaded and consequently won't fill up very fast.

Mr. McBride: We ask that each and every part of that answer be taken from the jury and the jury be instructed not to regard it.

Motion overruled; def't excepts.

18. Now, let us go back to these horses in Noble's barn in the condition in which you found them that you have already described as being gaunt and bruised up, you may state in their condition what, if anything, else you found about them.

A. Well, now, that would cover about all I could see. Some of them trotted out lame, of course, from the bruises.

19. I will ask you to state whether or not those horses at that time when you saw them were in a salable condition for the general market?

Objected to; ob. overruled; deft. excepts.

A. Well, I was there for the purpose of buying them——

The Court: Just answer the question put you.

A. I can only answer it by saying I didn't buy any of the horses.

Objected to.

A. I will answer it by "no" then.

The Court: Were they in a salable condition at that time, is the question?
A. No.

20. What would you say the fair market price of those horses in the condition which you say you saw them was at Martel?
A. Why, I didn't see them at Martel. I saw them at Mr. Noble's barn.
21. Well, at Noble's barn two miles away at that time and in the condition in which they were?

Objected to; ob. overruled; def't excepts.

194 A. Well, now, that would be a very hard question to answer. To me at tha ttime they was not salable.

Motion to take answer from jury as not responsive; motion sustained.
The Court: What was their fair market value at that time?

22. What was their fair market price?

Objected to; ob. overruled; deft. excepts.

A. I don't believe I could answer that question intelligently.
23. Did you examine these horses at that time?
A. They were lead out and showed to me and I examined them; yes, sir.
24. Now, you there for what purpose?

Objected to; ob. overruled; deft. excepts.

A. I was there to buy the horses.

Motion to take answer from jury overruled; deft. excepts.

25. Now, did you buy any of those horses?

Objected to; ob. overruled; deft. excepts.

A. No, sir, I did not.

Motion to take answer from jury; motion sustained.
No cross-examination.

Mr. Geer: I will now read the testimony given in the former trial of this case from the bill of exceptions, page 48, being testimony of J. M. Switzer.
Said testimony read by Mr. Geer, subject to the following objections and exceptions, as follows:

"Also J. M. SWITZER, who being duly sworn, upon direct examination, by Mr. Barker, testifies, as follows:

Q. 1. What is you name.
A. J. M. Switzer.
2. Where do you live?

A. I live at Belleville, O.

195 3. What is your business?

A. Well, I have been in the live stock business the most of my life—shipping live stock.

4. What length of time have you been in that business?

A. Well, the most of my life since I have been old enough to do business.

5. Selling what kind of stock?

A. Well, sell horses and cattle.

6. You are acquainted with th intiffs in this case, Stone & Noble?

A. Yes, sir.

7. In what market do you or[illegible]ly sell your horses?

A. Why, we have been shipping to Buffalo when we ship horses.

8. Did you sell any horses or were you in Buffalo in the stock yards there during March any time, the year 1907?

A. Yes, sir.

9. I will ask you if you recall having met Mr. Henry Stone there at that time examining any horses.

A. Well, I was there the most of the time from the first of the year on until June or July for the past years selling horses there; there was not any spring or has not been for the last two years, but I was there the most of the time, sometimes three or four months at a time and I remember of him having a load of horses come in there.

10. Do you recall about what time that was?

A. Well, I can't say just what date; it was along the spring of the year; perhaps it was at the date mentioned.

11. Along about the 20th of March or a little later.

A. I should judge it was about that time.

12. You examined those horses, Mr. Switzer, Mr. Stone showed you at that date?

196 A. Well, I can't say that I examined them any more than I walked around and looked at the horses in the yards, saw some of them out and one or two of them at the hospital.

13. Well, tell what the condition of those horses were.

A. Well, it looked to be bad."

Mr. McBride: We ask to have that answer taken from the jury. Motion sustained.

"14. Can you tell what that condition was?

A. I would say the condition was bad."

Motion to take answer from jury; motion sustained.

"15. What was the condition of those horses?

A. Well, they were—the condition? What do you mean, the appearance of them?

Yes."

Objected to; ob. overruled; deft. excepts.

"A. Well, they looked to me like a load of horses that had been shipped a long time; had a bad appearance."

Motion to take answer from jury; motion sustained.

"16. What about them that lead you to believe that?"

Objected to; ob. overruled; deft. excepts.

"A. Well, they looked like a horse would that had been on the cars a long while off of his feed and water, you know."

Motion to take answer from jury; motion sustained.

"17. Do you recall anything about those horses; were they scarred up or bruised or anything of that kind?"

Objected to; ob. overruled; def't excepts.

"A. Well, there were two of them, black and grey mare were badly bruised; looked as though they were down in the car; were bruised."

Motion to take answer from the jury.

The Court: That part of the answer which says, "looked as though they were down in the car" is taken from the jury and they will not regard it.

197 Motion to take answer from jury so sustained in part; pl'ffs except.

"18. Did you see those horses sold at the stock yard?

A. Well, I remember of them leading a pair in—I know those two, and sold them just as they were.

19. What do you mean?

A. Well, sold them in the condition they were in, which was not very good; they were bruised, looked as though they had been down in the car."

Mr. McBride: We ask to have that answer taken from the jury.

The Court: I will sustain your motion as to that part "Looked as though they had been down in the car."

Motion so sustained; pl'ffs except.

Mr. McBride: We ask that the rest of the answer be taken from the jury.

Motion overruled; deft. excepts.

"20. Well, now, you did not go over to the hospital and look at the horses that were there, did you, with Mr. Stone?

A. I went over to the hospital with Mr. Stone.

21. Now, regarding those horses what?

A. I do not remember but one horse there, that was a roam horse.

22. I mean the horses that were hurt, possibly that were in the hospital."

Objected to; ob. overruled def't excepts.

"A. I know what you mean and I was over with Mr. Stone to see the roam horse that was shipped in this load. He said he was. And he said he was very sick."

Motion to take answer from jury.

The Court: I will sustain the motion to this part, "He said he was. And he said he was very sick."

Motion so sustained; pl'ffs excepts.

198 "23. Do you know anything about any of those horses having died?

A. Well, they claim that this horse at the hospital I saw with him."

Motion to take answer from jury; motion sustained; pl'ffs excepts.

"24. You don't know that of your own knowledge?

A. Well, I don't remember seeing the horse after he died. I know shortly after we left there Mr. Stone was called up and he said——"

Objected to and motion to take answer from jury; ob. and motion sustained; pl'ffs except.

"25. You bought and sold horses a good many years?

A. Yes.

26. And are a pretty good judge of horse flesh?

A. Well, I never considered myself anything out of the ordinary.

27. Well, you know a good horse when you see it and you know its value?

A. I expect I would have a fair knowledge of it.

28. Would you be able to say what the value of those horses were in the condition they were?

A. No, sir.

29. You would not be able to state that?

A. No, sir.

30. Would you be able to say what the value of that roam horse would be in Buffalo on the day it arrived there in the condition in which it was then?

A. Well, I don't know as I could.

31. You can not recall that. You can not give any more definite description of those horses than what you have?

A. No, sir.

32. To what extent were they bruised and scarred and maimed?

A. Well, I couldn't say; they were not my horses and I didn't pay so much attention to it and perhaps if they had been I would, but they looked in pretty bad shape, those two I spoke of."

199 Motion to take answer from jury.

The Court: I will sustain the motion as to that part of the answer "but they looked in pretty bad shape, those two I spoke of."

Motion so sustained; pl'ffs excepts.

"33. Do you know at what time of the day or night those horses reached the block of sale on sale day there?

A. I can not recall that."

Mr. Geer: I suppose you will read the cross-examination.

Mr. McBride: Yes, sir.

And thereupon Mr. McBride reads the cross-examination of said J. W. Switzer, as follows:

"And upon cross-examination, by Judge Wolfe; as follows:

Q. 1. All you know about these being Noble's horses is what Noble told you?

A. I don't remember Mr. Noble. Mr. Stone——

2. You did not understand my question: all you know about these horses is what Noble told you?

A. Mr. Stone. Stone was the man there representing the horses.

3. All you know is what they told you that they were their horses?

A. Well, I saw the horses.

4. But I say all you know about those horses is what they told you?

A. Yes, sir, they claimed the horses; yes.

Mr. Barker: All you know about them being Stone and Noble's horses is what he Stone told you?

A. Yes, sir.

The Court: That is what he says."

Also L. W. BASHFORD, who, being duly sworn, upon direct examination by Mr. Geer, testifies, as follows:

Q. 1. What is your name?

A. L. W. Bashford.

200 2. Where do you live?

A. I live at Iberia.

3. How old are you?

A. 28 years old.

4. Are you acquainted with Henry M. Stone and Clark Noble?

A. Yes.

5. How long have you known Mr. Noble?

A. I guess about all my life; ever since I was big enough to crawl.

6. How far does he live from your home?

A. About three-quarters of a mile from my home.

7. How long has he lived in that place?

A. Well, I should judge ten years; maybe a little longer.

8. Have you ever been employed by Mr. Noble, or Stone & Noble?

A. Yes, sir.

9. Go to the fall of 1906, were you employed by him to assist in unloading a shipment of horses that arrived at Martel?

A. Yes.

10. Who else helped to unload those horses?

A. Ray McNeal, Charlie Curtis, Fred Bashford, my brother, Clark Noble and Mr. Smith.

11. Where is your brother?

A. My brother is in Tennessee now.

12. When did you go to Martel for the purpose of unloading those horses?

A. We went to Martel early in the morning.
13. How long before the horses arrived were you there?
A. At least twenty-four hours.
14. Do you recall when the horses did arrive?
A. Well, sir, it was between four and five o'clock in the morning.
15. Of the same morning you went there?
201 A. No, sir, the next morning .
16. What part did you take in unloading the horses?
A. Helped to move them from the car and from there to Clark Noble's barn.
17. How did you unload them from the car?
A. Well, we lead them out and some of them we had to go after and crowd out.
18. You may describe how you got them from the car down to the ground.
A. Well, the car was up and the chute there and we got in the car and took the horses and some of them were loose and we had to hitch a rope to them and lead them out.
19. Were any of them tied?
A. I don't think there were any except one tied; there may have been one tied.
20. Now, this chute, what do you mean by that?
A. Why, the stock yards made it a purpose for unloading stock.
21. Just a decline going from the car door down to the ground?
A. Yes.
22. Was that chute in good or bad condition, or describe the condition of that chute.
A. Well, it was not in what you would call first class condition by any means.

Judge Wolfe: We object as the chute is not in controversy.
The Court: The only purpose of this would be to exclude the idea that these horses were injured in the unloading.
Judge Wolfe: They do not charge that.
Mr. Geer: My purpose is to show it was not in the unloading and they did not injure themselves in the unloading.
The Court: It is not presumed it was done that way at all,
202 and if it would be proper at all perhaps in rebuttal.
Objection sustained.

23. How many horses were there?
A. Sixteen.
24. What did you do with them or he?
A. Took them to Noble's barn.
25. How far away from Martel is that?
A. Well, I would judge not over two miles and a half.
26. Did you or was your attention called to the condition of those horses as they were unloaded?
A. Well, it was called in a way, yes, sir. There were several of them all banged up.
27. Wait! Was your attention called in a general way to the condition of those horses?

A. Not exactly, no.

28. Well, did you notice the condition of those horses?

A. Yes, sir.

29. How long did you remain at Noble's barn the day you took the horses there?

A. I helped them to bring them home and after they got them home I left. There was other men to take care of the horses after I got them there.

30. Now describe the condition of the horses as you noticed and found them at the time you unloaded them.

A. Well, there was two sorrel horses that were hurt in the sifle joint and a roam horse hurt in the knee and a black horse hurt in the knees.

31. What about the others?

A. Well, they were all more or less boogered up.

203 Motion to strike answer from the jury.

A. Well, they were skinned up around the head and patches off and pealed up all over, and they were not fit for anybody to look at.

Motion to take answer from the jury.

The Court: I will leave the answer stand.

Motion overruled; deft. excepts.

32. How frequently did you see those horses after you unloaded them?

A. I didn't see them very often after that.

33. Who accompanied the horses and yourself to the Noble barn?

A. Charlie Curtis, Ray McNeal, Fred Bashford, my brother, Mr. Smith, and Mr. Noble himself.

34. Now, I will ask you to describe the general appearance or conduct of the horses as to being hungry or thirsty.

A. Well, they were all hungry and all thirsty.

35. You may just describe their actions in that matter and looks and appearance.

A. Well, they were gaunted up considerably; when we got them to the barn the first thing done give them some water and, of course, you didn't dare to give them all what they would drink.

Motion to take last clause of answer from jury; motion sustained.

36. What about feed?

A. We gave them feed.

37. What was their actions about that?

A. Well, they were very anxious to get it.

Motion to take answer from jury; motion sustained.

A. Naturally hungry and wanted something to eat.

The Court: What did the horses do is what you were asked.

38. The Judge puts the question properly. What did the horses do about getting feed?

204 A. Why, they eat it when they got it.

39. What did they do about getting it?

A. They got it. Well, we gave it to them.
40. Do you recall the date when those horses arrived at Martel?
A. Well, now, I don't know as I can exact date, but I think it was about the middle of October.
41. Of what year?
A. 1906.
42. Was or was not it daylight before you left Mr. Noble's barn?
A. Yes, it was after daylight.

And upon cross-examination, by Judge Wolfe; as follows:

Q. 1. What is your first name?
A. My first name is Lorenzo.
2. And the day you went there the horses did not arrive on the same day you went there?
A. No, sir.
3. What did you do?
A. Stayed there until the next day.
4. Did all of you stay there until the next day?
A. Yes.
5. Where did you stay?
A. Well, at the depot and in different places around the town.
6. At the depot in different places.
A. Well, I said at the depot and at different places.
7. Now, where did you stay?
A. Well, sir, we were at the depot for a time, part of the time, and at O'Dowd's part of the time and up at the other grocery part of the time, but within sight of the railroad all the time.
8. Were you there when the horses came, when the cars came?
A. Yes, sir.
205 9. What time of the day was it?
A. I should judge between four and five o'clock.
10. That was at Martel?
A. Yes.
11. Where was the car placed?
A. The car was placed right there at the stock yards.
12. At the chute?
A. Yes.
13. How many worked to getting them off?
A. I think there was six of us.
14. And there were sixteen of the horses?
A. Yes, sir.
15. How did you take care of them; did you put halters on each?
A. Yes, sir.
16. Then fastened them together and took them home?
A. Yes, sir.
17. Did you ride them home or lead them?
A. I walked and lead what I had.
18. How many did you have?
A. I had three.
19. Who else took a bunch of horses?
A. Mr. Smith had a bunch of them.

20. Who else?
A. Charles Curtis.
21. That is your brother?
A. No, sir.
22. Who else had a bunch?
A. Fred Brashford.
23. Anybody else?
A. Ray McNeal.
206 24. Somebody had four, didn't they, in the bunch if there were sixteen horses?
A. I think so.
25. Do you remember who had four?
A. I couldn't say now.
26. Well, you took the horses home to his barn and you all traveled home together pretty closely?
A. We were not a great ways apart any time; of course, it strung out some.
27. How long after you began to unload the horses was it you had them in the barn?
A. Well, I don't know; I couldn't answer that question just exactly how long it was.
28. Couldn't you give a guess?
A. No, sir.
29. You unloaded at four o'clock in the morning?
A. Between four and five.
30. Well, about what time was it you got home?
A. Well, it was eight or nine o'clock anyway I would judge.
31. And you put them in the barn as soon as you got home?
A. Yes, sir.
32. How long did it take you to unload them?
A. I didn't keep any time on them.
33. What time was it you got them unloaded and put them together in bunches?
A. I don't know.
34. You said you got them home eight or nine o'clock?
A. Yes. Well, it was some time between that certainly.
35. Now, what time did you get them unloaded and in bunches?
A. Well, it might have been seven o'clock, I don't know. I don't remember.
207 36. About how far did you go?
A. About two miles and a half.

And upon redirect examination, by Mr. Geer, as follows:

Q. 1. I want to further inquire of you, and it should have been part of my examination in chief: mention was made about a sorrel horse particularly. Do you recall the condition of that sorrel horse?
A. That sorrel horse was very lame.

Motion to take answer from jury; motion overruled; def't excepts.

2. What, if any, trouble, did you have getting her out of the car?

A. Well, I don't know as I took her out. I am not able to say as to that.

3. Did you see these horses the morning after they were in Noble's barn?

A. The next morning after they were put in?

—. Yes.

A. No, sir.

4. When did you next see them?

A. Well, I don't know as I was back there at any time.

5. Were you there when Mr. Bailey was out at the barn to buy the horses?

A. No, sir.

By Judge Wolfe:

Q. 1. Who had the very lame one?

A. Well, I couldn't say as to that, but I didn't.

2. Did you have any of the three that you have mentioned that was injured?

A. Yes.

3. How many of them?

A. Just one.

4. Can you tell who had either of the others?

A. I can not now.

208 Also RAY MCNEAL, who, being duly sworn, upon direct examination by Mr. Geer, testifies, as follows:

Q. 1. What is your first name, Mr. McNeal?

A. Ray.

2. How old are you?

A. Twenty six years old.

3. Where do you reside?

A. Iberia, Ohio.

4. What is your business?

A. Working in a store and on the farm.

5. How long have you lived in that community?

A. All my life.

6. Do you know Clark Noble?

A. Yes.

7. How far does he live from your home?

A. About a half a mile.

8. How far do you live from Martel?

A. Four miles.

9. Were you employed by Mr. Noble any time during 1906 to assist in unloading a shipment of horses?

A. Yes, sir.

10. Do you remember the month and what year it was in?

A. October, I believe, 1906.

11. Do you remember the day of the month you helped to unload them?

A. Not exactly, but I think along about the middle of the month.

12. Now, where did you unload these horses?
A. Martel.
13. Who was with you?
A. Mr. Bashford and his brother and Mr. Curtis.
14. How long before the horses arrived were you at Martel to receive them?

209 Objected to "receive them."

15. Well, I will cut that out. How long before the horses arrived were you there with Mr. Noble at Martel at that time?
A. Oh, we went over there in the morning along about six or seven o'clock and the horses were unloaded there about four or five o'clock the next morning.
16. And during that time what were you waiting over there for?
A. We went over there to unload those horses.
17. Did you help to unload them?
A. Yes, sir.
18. Were you there when the horses arrived?
A. Yes, sir, I was.
19. What time of the day did they arrive?
A. Well, in the morning and I don't know exactly what time; along about four o'clock, three or four and maybe five.
20. Who else was there?
A. Mr. Bashford and his brother and Mr. Curtis, Mr. Noble and myself.
21. And what did you do when the carload of horses arrived there?
A. We opened the door and lead them out in the yard, haltered and re-haltered them.
22. You say re-haltered; were any haltered?
A. Some had halters on and ropes broke and they were off and replaced, and some broke; some had torn clear off of them.
23. Where were the halters and ropes?
A. In the car.
24. Loose or tied to the side?
A. Some were loose and some were tied up, some of the halters.
25. Now, Mr. McNeal, did you notice the condition of the horses when they were unloaded?
A. Yes, sir.

210 26. Now, you may just describe the condition, first as to any bruises or lameness that you observed.
A. Well, they were all more or less bruised up.

Motion to take answer from jury; motion overruled; def't excepts.

27. Now, did you notice any specific thing in any particular horse that was especially bruised or crippled in any way?
A. Well, there was one horse and it was a dark colored horse and I couldn't say whether black or brown, but he was a dark colored horse and badly bruised over the hip and stifle on his hind leg some place, I can not remember now, but bruised on his hind leg and skinned up pretty bad and in a bad condition.

28. Did you notice any other horse you could describe by the color that was particularly bruised or injured?

A. Well, not as to the color but they were all more or less bruised.

Motion to take answer from jury; motion overruled; def't excepts.

29. What would you — as to their looks or appearance particularly as to having received care and attention during their shipment?

A. Well, they didn't look like they had very much care.

Motion to take answer from jury; motion sustained; pl'ffs except.

30. What was their general appearance, Mr. McNeal?

Objected to; ob. overruled; def't excepts.

A. Their general appearance was they were pretty badly skinned up.

Motion to take answer from jury; motion overruled; def't excepts.

31. I am asking with reference to their having been recently fed and watered.

Objected to.

The Court: He can tell their appearance and it is for the jury to say what their appearance was due to.

Motion sustained; pl'ffs excepts.

32. Proceed to describe the appearance of those horses other than what you have already described.

211 Objected to; ob. overruled; def't excepts.

A. They were badly bruised up and when we took them outside to water they were very thirsty and we didn't let them have all the water they would drink.

Motion to take answer from jury; motion overruled; def't excepts.

Mr. McBride: We ask to have each part of the answer taken from the jury.

Motion overruled; def't excepts.

33. Did you experience any difficulty in getting any of them off of the car and, if so, state what it was.

A. Yes, sir, we had quite a little trouble with this brown or dark colored horse to get him off of the car.

34. What was the matter with him?

A. Well, he was very lame.

35. Did you accompany those horses to Noble's barn?

A. Yes, sir.

36. How long did you remain there?

A. Two days.

37. What did you do with the horses, or did you have anything to do with the horses, during the time you stayed there?

A. I fed them and curried them and helped to take care of them.

38. During that time I will ask you whether or not a Mr. Bailey of Mansfield came to look at those horses.

A. I don't remember of him being there while I was there.

39. After you were there those two days what did you see of the horses after that if you remember?

A. That was the last that I had charge of them.

And upon cross-examination, by Judge Wolfe; as follows:

Q. 1. Now, McNeal, you went there and got there a day before the horses came to Martel, didn't you?

A. Yes, sir.

212 2. How many of you were there?

A. There were four of us besides Mr. Noble.

3. What did you do from that time until the horses came?

A. We waited for the horses.

4. What did you do?

A. We stayed in the depot.

5. Did you all stay in the depot?

A. Yes.

6. At the freight or passenger depot?

A. The freight and passenger depot is together.

7. Just the same thing there?

A. Yes, sir.

8. When did you learn that the horses were there?

A. Why, the next morning, three or four o'clock in the morning.

9. Where were you when you knew the horses were there?

A. We were there at Martel, at the depot.

10. All of you there at the freight depot?

A. Yes, sir.

11. Who talked to you about the horses being there?

A. Why, Mr. Noble was there and the operator, and the train came in and he said——

12. No, I am not asking you what he said but he talked to you?

A. Yes.

13. What did you do then?

A. Went down and unloaded the horses.

14. How soon did you go down after you talked to him?

A. After we talked to whom?

15. After you saw the operator and he said what he did how soon did you go down?

A. As soon as the train came in, as soon as they got the

213 car stopped they run it——

16. I didn't ask you that, but how long was it; was it an hour?

A. No, it was not an hour.

17. An hour do you say?

A. No, sir, it didn't take us an hour to walk from the depot to the sidetrack.

18. I didn't ask you that, but how long was it from the time you had the talk with the agent until you got there and were unloading the horses?

Mr. Geer: I ask that Judge Wolfe's lecture to the witness be stricken from the question.

The Court: The jury will not consider it.

19. Will you answer my question? How long was it after the agent talked to you until you got down there and got to unloading?

A. I should judge it would take us about ten minutes to walk down——

20. No, I didn't ask you that. How long was it?

A. Exactly?

21. Oh, give an idea; was it a half hour?

A. It was not a half hour; it would not take us a half hour——

22. Was it?

A. No, sir.

23. After you got down there how long did it take you to unload them?

A. I suppose we were probably 30 or 40 minutes unloading.

24. You found some tied and some untied; how many were tied?

A. I couldn't say.

25. Were you in the car?

A. Yes.

26. When you began to unload?

A. Yes.

27. Did you stay in the car until you got through unloading?

A. No, I lead some of the horses out.

214 28. You would not say how many were tied an dhow many loose?

A. No, I couldn't say now.

29. Now, when you got out what did you do with them?

A. Why, we put halters on those that didn't have halters on and tied them to the fence until we got the bunch all unloaded and they lined them up.

30. What do you mean by lining up?

A. Tied three or four horses together.

31. How many groupes did you have?

A. Four, possibly five.

32. Did you take charge of one?

A. Yes.

33. And each group was lined by one of the boys or men?

A. Yes.

34. How far was it to Noble's barn?

A. About three miles and a half.

35. Did you ride them down or lead them down?

A. Why, I rode one horse and lead three of them.

36. How long did it take you to go out there, about what time to Nobles'?

A. It was daylight when we got there and I don't know exactly the time.

37. Might not it have been six o'clock?

A. Later than that.

38. Well, how long did it take, what length of time about?

A. Well, possibly later than six; probably between six or seven.

39. Now, when you got them to the barn there was no particular

incident until you got them there, but each one of you rode a horse and lead the others?

A. I don't remember what the rest of the boys done.

40. At any rate you went out there together?

A. Yes, sir.

215 41. Now, did you have any in your group that were lame: that went lame?

A. I don't remember.

And upon redirect examination; by Mr. Geer; as follows:

Q. 1. Mr. McNeal, do you mean to say that it was about six o'clock when you arrived at Clerk Noble's or will you attempt to give the time that you arrived there?

Objected to.

2. Let me put it this way: do you mean to fix the time exact or can you tell?

A. No, I cannot tell, not exactly; I couldn't tell.

3. Now, when you went out there to Martel what other business did you have, if anything, other than unloading those horses?

A. We did not have any other business.

4. And you remained around there until the horses arrived, having no other business?

A. Yes.

5. Now, in taking these horses from the train to Noble's barn at what speed did you take them there?

A. We let them walk all the way.

Mr. Geer: I now desire to read in evidence the deposition of John Baker, taken on behalf of the plaintiff at the office of the Crandall Horse Company, East Buffalo, New York, at which L. W. Cole was present on behalf of plaintiffs, Dana B. Hellings on behalf of defendant, before Ferdinand E. Finsterbach, Notary Public, for the County of Erie and State of New York, where various other depositions were taken to be used as evidence in behalf of both parties to this action, as follows:

"JOHN BAKER, of lawful age, being by me first duly cautioned and sworn, and examined by Mr. Cole for plaintiffs, deposes and swore, as follows:

216 Q. Where do you live?

A. Buffalo.

Q. Are you in the employ of the Crandall Horse Company?

A. Yes, sir.

Q. Were you at the time of these shipments in question?

A. Right here.

Q. You were in their employ at the time of the shipments in question?

A. Yes, sir.

Q. Do you know Stone & Noble?

A. Yes, sir.

Q. Are you acquainted with Henry M. Stone?
A. Well, I worked on his horses.
Q. You know him?
A. Yes, sir.
Q. What are your duties here, Mr. Baker?
A. Cleaning horses, taking care, running during the sale.
Q. And you handle the horses, do you?
A. Yes, sir.
Q. Do you remember the shipment of horses on the 9th or 10th of March, 1907?
A. I tell you there were two loads of horses. I took care of one load, we sold out in a few days, and we got another load, so I took care of both of the loads, yes, sir.
Q. Well, we will take this shipment of the 9th, did you remember that, the first one?
A. That is the load that——
Q. You don't know much about the first one then?
A. No.
Q. We will take the second one, the shipment of March 23rd, what did you have to do with that?
217 A. Why, I got them off the cars.
Q. You went in the car to get them off?
A. Yes, sir.
Q. Where was the car?
A. On the Erie.
Q. At what time was it that you went in the car to get them off?
A. Why, I guess we were called out here at two o'clock to go up and get them.
Q. Was it on a Saturday?
A. Yes, sir.
Q. Well, did you help unload them?
A. Yes, sir.
Q. What did you do with them?
A. Why, then I had to put them in the stalls and give them a little grain.
Q. Did you notice the condition of the horses when you went to the car?
A. Well, they were in bad condition when we got them off—in bad shape, and when I got here I asked Henry Stone where did he get them horses."

Motion to take answer from jury; motion sustained; pl'ffs except.

"Q. You what?
A. They were in bad condition, I said, where did you get them."

Motion to take answer from jury; motion sustained; pl'ffs except.

"Q. Well, what condition were they in,—describe it?
A. Why, they were all bruised up, eyes, all cut up, and knees, big as a foot ball, hardly could stand on them, and some of them was all scratched up, their hocks was all big bunches on their hocks, there was two horses come off sick."

218 Objected to and motion to answer from jury; objection and motion overruled; def't excepts.

"Q. How did they look as to being gaunted and rough?
A. Well, they were going right at the fence, they were going to eat the fence up."

Objected to and motion to take answer from jury; objection and motion sustained; pl'ffs except.

"Q. Well, did they look gaunty and rough?
A. Yes, they looked rough, and all chewed up, some of them, their tails had been chewed up."

Objected to and motion to take answer from jury; ob. and motion overruled; def't excepts.

Q. Well, you said as to their being hungry and thirsty.
A. Well, I will tell you, first horse we got up, we opened the door, and the horses run right out and there was a lot of straw there, where the lambs and cattle goes over and munched on it a little, on the dirty road, they were picking that stuff up around the yard."

Objected to and motion to take answer from jury; objection and motion overruled; def't excepts.

"Q. Well, what did the other horses do?
A. The other horses, then we held them back, we wouldn't let them run out any more.
Q. When they did come out?
A. They were chewing the fence, and were going to eat the fence up."

Objected to and motion to take answer from jury; objection and motion overruled; def't excepts.

"Q. What did that indicate?
A. That they were hungry."

Objected to question and motion to take answer from jury; objection and motion sustained; pl'ffs except.

219 "Q. And how about their drinking, did you notice anything about that?
A. Well, drinking, why I couldn't get them out,—I take a pail and when it was—I take a pail, I give them about two quarts, that is, taking the chill off the water, I give them about two quart and I couldn't get the head out, and he would not take his head out afterwards.
Q. They were greedy after water and food?
A. Greedy after water and hay."

Question and answer objected to; ob. sustained; pl'ffs except.

"Q. That indicated they were starving and thirsty?
A. They were starved and——

Q. And dry, eh?
A. Yes, sir."

Last two questions and answers objected to; objection sustained; pl'ff excepts.

"Q. Well, did you have the care of them in the stable?
A. Yes, sir.
Q. And did you stay with them?
A. Yes, sir.
Q. What did you do in taking care of the horses?
A. Well, them sick horses, I went right after them, and bathed them, and went downstairs and borrowed some medicine from Wier to give them a dose of Kronkine and the other horse was chilly, and I put four blankets on him.
Q. Did you know that one of the horses died?
A. Yes, sir.
Q. Which one was that?
A. That was the roam horse and the grey horse.
Q. What was the matter with the roam horse?
220 A. Well, it seems to me with the feed, when they give them a couple of feeds, and give them a little water, and after gave him Kronkine and then all at once he took chilly.
Q. Was he cut and bruised any?
A. He was bruised up, yes sir.
Q. Have you had any experience in shipping horses and unloading horses from cars?
A. Yes, sir.
Q. Can you tell how those bruises came?
A. Well, they had some—they had a pretty decent car, but they had been shoving them all over and bunking—they had been eating and picking the dirt out from the floor."

Mr. McBride: We object to that answer.
Objection sustained; pl'ffs excepts.

"Q. Was it due to rough handling of the car?
A. Why it must of been."

Question and answer objected to; ob. sustained; pl'ffs excepts.

"Q. How many horses died?
A. Two—no the grey horse wasn't dead, I thought he died—one horse died.
Q. When did the roam horse die?
A. Died Monday morning.
Q. Did you work that night until twelve o'clock on the rest of the horses?
A. Yes, sir."

Answer objected to; ob. sustained; pl'ffs excepts.

"Q. How many horses could you say were bruised and cut?
A. I can't remember just now.
Q. Well about—as near as you can remember.

A. Well there were several of them there—seven or eight of them it was—I couldn't handle all of them, and I took care
221 of only the worse ones out of the bunch.

Q. Can you tell by reading over the lists of these horses which ones were bruised and cut?

A. No, that I didn't keep tract of.

Q. What did you do in taking care of the horses?

A. Well cleaned them—feed them.

Q. Put blankets on them?

A. Blankets on them.

Q. Have you had lot of experience in taking care of horses?

A. Well for the last twelve years.

Q. For twelve years?

A. Yes, sir.

Q. And you know what to do when they are in bad condition, sick or bruised or cut up?

A. Yes.

Q. And did you do what you ordinarily do?

A. Yes, sir.

Q. Under those conditions?

A. Yes, sir."

Mr. McBride: We object to that question and answer.

Mr. Geer: We think that is perfectly proper.

Objection sustained; pl'ff excepts.

#Q. And what was necessary to do?

A. Yes, sir."

Question and answer objected to; ob. overruled; deft. excepts.

"Q. How long have you been in the horse business here?

A. Twelve years.

Q. Have you seen horses bought and sold here in the ring?

A. Yes.

222 Q. Horses of that class and kind?

A. Yes, I go and run with them over there, holding them by the head and running up and down.

Q. Right in the auction ring?

A. Yes, sir.

Q. What kind of horses were they?

A. Well, I tell you, they were in bad condition, but Mr. Stone said they ought to be in good shape, they were good built horses."

Answer objected to; ob. sustained; pl'ffs. except.

"Q. They were good built horses?

A. Good built horses, yes, sir, and they were a good class of horses, but when they come off they were in bad shape."

Mr. McBride: We object to that clause in the answer "but when they come off they were in bad shape."

Objection sustained; pl'ffs except.

"Q. Well, what were they—what class of horses,—would you call them draft horses?
A. Draft horses, yes, sir, brewery horses."

Answer objected to; ob. overruled; deft. excepts.

"Q. What?
A. They were brewery horses.
Q. Do you know the value of horses of this kind here?
A. Yes, sir.
Q. Do you know the market value, or the value of horses in good condition at that time?
A. Yes, sir.
Q. Of that class and kind?
A. Yes, sir.
Q. And what do you say would be the value of these horses if they had been in good condition and properly carried here and
223 delivered in good condition?
A. Well, they were horses that we would get about $250.00 or $300.00.
Q. Apiece?
A. Yes, sir."

Last two questions and answers objected to; ob. overruled; deft. excepts.

"Q. Were they worth that in the market that day?
A. Yes, sir, the roam horses were worth more than that.
Q. Well, on that day do you think the carload was worth $250.00 apiece?
A. About $225.00 apiece except that one—there were three good horses in the bunch that were worth $350.00 during the time they were selling, they were here for brewery horses."

Mr. McBride: We object to that part of the answer "They were here for brewery horses."
Objected sustained: pl'ffs except.

"Q. Do you think they would average $250.00 apiece?
A. Yes, sir."

Mr. Geer: Mr. McBride, will you read the cross examination?
Mr. McBride: Yes, sir. It is as follows:

"Cross-examination by Mr. Hellings.

Q. Do you keep any record of the horses you have charge of here for the Crandall Horse Co.?
A. No, sir, not as I know, we don't keep it.
Q. Have you been testifying previously then from memory, your recollection of them?
A. I tell you the way we are over here, we are not supposed to keep any record of the horses at all, all we have to do over there is to just take care of them, feed them and look after them.

Q. And all you have testified to is just what you remember
224 concerning these horses,—it isn't from any record you have?

A. No.

Q. Can you s-ate the injuries of any one particular horse in either of these shipments had?

A. Well, they could be, they were handled over here in——

Q. No, I mean,—you can answer that yes or no, do you remember of any particular injury of any one horse had in that shipment?

A. Well, I can't just now, it's a long time, but I know some of them, I took care of them, I know they injured them, knees, and hocks and eyes, I remember them.

Q. Well, what horses in the shipment had injured knees, do you remember that?

A. No, too long, I take care of too many of them, and one load I jump on the other load.

Q. What horses had injured hocks?

A. Well, there was a grey horse, and a roam horse, and another bay horse.

Q. Roam horse is the one that died?

A. One that died, yes.

Q. That is two,—do you remember any others?

A. Two many of them colors, I don't remember them, I don't remember anything else.

Q. Do you remember any injuries that any of the other horses except those two had?

A. Well, there was a lot of them, but I don't know the colors of them, I don't remember it.

Q. Well, how many horses out of the shipment would you say was injured?

A. Well, about nine of them.

Q. You only examined the second shipment, as I understand you?

A. That is the second shipment that was up stairs, the
225 March 23rd.

Q. March 23rd shipment?

A. Yes.

Q. You didn't examine the one on March 10th?

A. No.

Q. Don't you know anything about that?

A. No, I took care of them but there was nothing much injury, some of them was a little bruised up; we had a barn full and we had to get horses there upstairs and downstairs, be running and running around.

Q. You say there were nine horses in the second shipment that were injured?

A. They were injured—maybe there were more but I can remember nine of them.

Q. Do you remember nine particularly?

A. There was a pair of bays and the greys, chestnut horse, they had a chestnut, there was some black ones, couple of black horses,

that is all I can remember now. I had them right in front of the door.

Q. You don't know how those injuries were received you testified to here?

A. No.

Q. Don't know any more than when you saw the horses they were in the condition of which you spoke?

A. Well, I tell you. There were quite a few of them, the bad ones.

Q. Well, you don't know how they were hurt?

Mr. McBride: I will not read that answer where it seems he would testify what Henry Stone told him.

Mr. Geer: I think there is part of that that should be read where he implied they were hurt.

The Court: He says what Henry Stone told him and then
226 what he did. I don't think you have a right to cut the answer into. He can read it all, as I can not eliminate any of it without destroying the sense.

Mr. McBride: Well, we will omit it and if he offers it we will preserve our exceptions.

Said answer being "No, I don't know how they were hurt, only Henry Stone told me to go after them,—look after them and I went after them, had a halter over there, I know."

"Q. How much time did you see the horses in this second shipment after you received them?

A. Why, I stayed right with them, took care of them that Saturday, Sunday until Monday morning, until eight o'clock.

Q. And did they look*ed* as thoug they had kicked one another any?

A. No, sir, they were gentle horses, you could do anything with them.

Q. Were there any of them that had been tramped on?

A. I don't remember just now.

Q. You know Mr. Stone the plaintiff?

A. Yes, sir.

Q. Was he present when those horses were received?

A. Yes, sir.

Q. Was Mr. Noble there?

A. No, sir.

Q. When did you say this roa*m* horse died?

A. Monday morning.

Q. Were you with him at the time he died?

A. No, I just went upstairs to Claris to find out how the horse was getting along and he said he died.

Q. You were a witness on the first trial of this action were you not?

A. Sir?

227 Q. You were a witness on the first trial of this action were you not?

A. Yes, sir.

Q. Do you remember stating on that trial the horses died at eight o'clock Sunday night?

A. Sunday night? I don't just remember now, I think it was on Monday, no, I tell you Monday morning, that's right, that's a mistake, I told him Monday morning.

Q. Did you testify he died eight o'clock Sunday night?

A. I don't just remember that.

Q. You don't want to swear you didn't, do you?

A. Can't remember just what time, I know I told Stone about it, I was there Sunday, I went to supper, and got supper and come back again.

Q. Well, you don't know from personal experience what time that horse died, do you?

A. No, not what time that horse died.

Q. You did not see him die?

A. No, I was not there at that time."

Mr. Geer: I will now offer in evidence from said cross examination the question and answer that Mr. McBride omitted.

Mr. McBride: We object to the question and answer.

Objection overruled; deft. excepts.

Mr. Geer: It is, as follows: "Q. Well, you don't know how they were hurt? A. No, I don't know how they were hurt, only Henry Stone told me to go after them,—look after them and I went after them, had a halter over there I know."

Mr. McBride: We now ask the court to take said answer from the jury and each and every part of it specifically and instruct the jury not to regard it or any part of it.

Motion to take jury overruled; deft. excepts.

228 And thereupon Mr. Geer reads the re-direct examination of said deposition, as follows:

'By Mr. Cole:

Q. Did you see him after he was dead?

A. Yes, I seen him after he was dead, had to take the blanket off of him too.

Q. You knew he was dead Monday morning?

A. Dead Monday morning.

Q. And you saw him?

A. Went up there and got the blanket."

And Mr. McBride reads the re-cross examination of said deponent, John Baker, as follows:

"By Mr. Hellings:

Q. What is it you gave him, some medicine, didn't you?

A. That is when he come off the car.

Q. What medicine was that?

A. Kronkine.

Q. Where did you get it?

A. From Mr. Wier, the man who was working with me, he had a load of horses and Mr. Stone saw the load of horses downstairs.
Q. You are not a Veterinary Surgeon, are you?
A. No, but that is what we used to do when horses gets chilly or anything of that kind, we give them Kronkine.
Q. Do you know what the condition of the horse was when he got off the car?
A. Well he come out dumpish, and I was going to lead him myself.
Q. You are not able to specify are you just what the injuries of those nine horses you have referred to consisted of?
A. I saw the nine horses, that's all.
Q. You are not able to tell what each one of those nine horses had?

A. No.

229 Q. You are not able to state whether the injuries are permanent, do you?
A. No.
Q. Or whether they would affect the selling price?
A. Oh they would affect selling, yes.
Q. How do you know that?
A. Why because the buyers, same as anybody else, like to buy a strange horse that don't show any bruise or anything on him.
Q. You are not able to say if any of the injuries to any one of those horses which you saw would be permanent, would you?
A. Why it would affect the sale.
Q. Would they be permanent, any of them, are you able to say?
A. Oh I ain't able to say that.
Q. You would not be able to say that each one of those horses would not recover from the injuries which you noted at that time.
A. (Shakes his head in the negative.)
Q. Are you able to give any more definite information with regard to the injuries which you noticed on these nine horses than what you state?
A. That is all I know.
Q. You don't know, do you, if any one of those horses were seriously injured?
A. No."

Mr. Geer: We rest, your Honor.
And thereupon the plaintiff rested.
Mr. McBride: We now make the following motion:
"Now comes the defendant at the close of plaintiff's evidence and moves the Court to arrest the evidence from the jury and to direct the jury to return a verdict for the defendant as against each cause of action separately."
Motion to arrest evidence and direct verdict overruled; deft. excepts.

230 Whereupon the defendant, to maintain the issue upon its part, gave and offered to the jury the following evidence, to-wit:

Defendant's Evidence.

Mr. McBride: We now offer in evidence Live Stock Contract, our Exhibit A.

Objected to; ob. overruled; pl'ffs excepts.

Mr. McBride: I now read "Def't's Exhibit A." to the jury.

Mr. Geer: We object to counsel reading that exhibit to the jury. Objection overruled; pl'ffs except.

And thereupon Mr. McBride reads said exhibit to the jury.

Mr. Geer: We ask that that testimony, "Def't's Exhibit A." be withdrawn from the jury and the jury instructed not to regard or consider it, for the reason as to the company's negligence in handling this shipment the same is no defense.

Motion overruled; pl'ffs except.

Said Live Stock Contract so admitted and read in evidence, hereto attached, marked "Def't's Exhibit A", and made a part of this bill of exceptions.

Mr. McBride: I now offer in evidence Live Stock Contract, our exhibit B, and this is the shipment of March 6th from St. Marys east to Buffalo, and I will not read this at this time as they are uniform but read such portions as I desire in argument.

Objected to; ob. overruled; pl'ffs except.

Said Live Stock Contract admitted in evidence, hereto attached, marked "Def't's Exhibit B", and made a part of this bill of exceptions.

Mr. McBride: I now offer in evidence Live Stock Contract, our Exhibit C, shipment to East Buffalo from St. Marys, March 20th, 1907, and I will not read it now but later, being exactly like the others except the date of shipment.

231 Objected to; ob. Overruled; pl'ffs except.

Said Live Stock Contract admitted in evidence, hereto attached, marked "Def't's Exhibit C," and made a part of this bill of exceptions.

Mr. McBride: I now want to read in evidence the testimony of H. C. Zerby, given upon the former trial of this case, he now living beyond the jurisdiction of this court, as follows:

"H. C. ZERBY, who being duly sworn, upon direct examination, by Mr. Gallinger, testifies, as follows:

Q. 1. What is your name?

A. H. C. Zerby.

2. Where do you live?

A. St. Marys, Ohio.

3. What business are you engaged in now?

A. I am Secretary, Treasurer and Manager of the Heisler Company.

4. What was your business in 1906 and 1907?

A. I was local agent for The Lake Erie & Western at St. Marys.

5. Ticket and freight agent?

A. Yes, sir.

6. During 1906 and 1907, you may state whether or not you were acquainted with Mr. Stone and Mr. Noble and Mr. J. T. Smith.

A. Yes, sir.

7. Did they make shipments of horses from St. Marys on October 10th, 1906, while you were agent there?

A. They made shipments off and on, but just for me to say——

8. Would that be in 1906?

A. I couldn't say.

9. Well, I hand you a paper, marked Defendants' Exhibit A, purporting to be a live stock contract of date October 10, 1906:
232 you may look at it and state whether that is your name at the bottom of it.

A. Yes, sir, that is my name.

10. State whether it was put *their* with your authority or whether you did it."

Objected to; ob. overruled; pl'ffs except.

"A. I didn't put it there. It was put there by my authority."

Motion to take answer from jury; motion overruled; pl'ffs except.

"11. By whom?

A. By the chief clerk.

12. What was his name?

A. W. L. Werts.

13. Now, you may look at this Defendants' Exhibit B, live stock contract of date March 6th, 1907, and state whether that is your name at the bottom of it?

A. That is my name.

14. And is that in your handwriting?

A. Yes, my own writing.

15. This is your writing?

A. Yes.

16. Who signed that at the time when this was made?

A. My signature.

17. No, besides your signature.

A. Mr. Stone.

18. For Stone & Noble?

A. Yes."

Motion that last two answers be taken from jury and objection to last two question-; motion and objection overruled; pl'ffs except.

"19. State to the jury whether or not one writing was made at that time or whether a carbon copy was made at that time.

A. There was a carbon copy made at that time; we put a
233 carbon between the two copies.

20. Two sheets like this?

A. Yes, and make a carbon copy with the same writing, the original and the carbon copy.

21. Now, look at this Defendants' Exhibit B, and state whether that is the original or duplicate?

A. This is a carbon copy of the original.

22. There were two copies made with one writing?
A. Yes.
23. Now, what was done with the one, where is that writing?
A. That was given—I don't know whether given to Mr. Stone, but it is usually given to the man that goes in charge, Mr. Stone.
24. This was given to Mr. Stone?
A. Yes."

Mr. Geer: We object to the last two questions and answers.
The Court: It only tends to show what the system is.
Objections overruled; pl'ffs except.

"25. Now, what did you do with the other one, this one?
A. That was placed on file in the office.
26. Of the Company?
A. Yes.
27. At St. Marys?
A. Yes.
28. Now, you may look at this Defendants' Exhibit C, live stock contract of date March 20th, 1907: you may state whether that is your name there.
A. That is my name.
29. Did you put it there or who did?
A. W. L. Werts.
30. Who was W. L. Werts?
A. The cashier."

234 Questions 29 and 30 and answers objected to; ob. overruled; pl'ffs except.

"31. Was it done by your authority?
A. Yes.
32. Do you know Mr. Werts' handwriting do you?
A. Yes, sir.
33. You may look at that signature on the back of Exhibit C and state whether that is his signature.
A. That was Mr. Werts' signature.
34. You may state whether this one of March 20, 1907, our Exhibit C, is a duplicate likewise, like the one you testified to of March 6th, 1907.
A. It is.
35. And look at Defendants' Exhibit A, of date October 10, 1906, and state — that is a duplicate also like the others.
A. Yes, sir."

Objected to; ob. overruled; pl'ffs except.

"36. Mr. Zerby, tell the jury whether tariff rates, classifications for shipment of freight were on file in your office at the time these three shipments were made at St. Marys.
A. They were, yes."

Question objected to and motion to take answer from jury; ob. and motion overruled; pl'ffs except.

"37. And you may state what notice, if any, was posted as to them relative to the tariff rates being on file.

A. A notice in the gents' waiting room, which was a part of the waiting room used for parties coming in to make shipments of freight, or having freight business; the freight and passenger included in the same the freight and ticket office being in the same office. There was a notice in that room that tariffs for this company were on file for public inspection."

235 Question objected to and motion to take answer from jury; ob. and motion overruled; pl'ffs. except.

"38. State whether the notice was in the language of the one I now hand you marked Defendants' Exhibit F."

Mr. Geer: I objected to that as leading and improper. I base my objection on two grounds to that and to the answer, first, if it was properly put it would not constitute any defense to the action here for negligence, and, second, that it is not properly put. The main thing is that the publication of these tariff rates could not be used as a defense in actions of this character.

Objection overruled; pl'ffs except.

"The Court: That is a little too leading, Mr. Gallinger.

39. Perhaps it is. State whether this paper marked Defendants' Exhibit F, whether or not that notice was in the form of this one. What is the fact in regard to that?

The Court: How does that notice compare with this one?

A. That is an exact copy of what was put up in the station at the time.

40. Now, what difference is there, if any, between this one and the one that you state was posted up?

A. The one that was posted up was on a white cardboard.

41. And this is on a red cardboard?

A. Yes, sir.

42. Was there any difference otherwise in the language or in the print?

A. No, sir.

43. All the same?

A. Yes.

44. Was the size the same?

A. The size was about the same."

236 Mr. Geer: We now renew our objection on the same ground.

Objection overruled; pl'ffs except."

"45. Now, tell the jury whether this paper I hand you, Defendants' Exhibit G was on file in your office at the time when you were a freight agent of the Lake Erie & Western Railroad at St. Marys?

A. Do I understand this paper?

46. Yes, and this one.

A. I couldn't tell you that.

47. Then, I'll ask you whether an exception, what is called an

exception to official classification of freight tariff, was on file in your office at St. Marys at the time you were freight agent there."

Objected to; ob. overruled; pl'ffs except.

"A. Yes, sir.

48. Now, you may state whether the exception to official classification for handling of freight was like the one I here hand you, marked Defendants' Exhibit G."

Objected to; ob. overruled; pl'ffs except.

"A. There was on file exactly like this here; an exact copy of this.

49. And state whether a paper like that was on file in your office at the time you were freight agent at St. Marys.

A. There was, yes, sir.

50. And also you may look at Defendants' Exhibit J, and state whether a paper like that one was on file in your office."

Objected to; ob. overruled; pl'ffs except.

"A. There was, yes, sir.

51. Now, I hand you a book, marked Defendants' Exhibit K, purporting to be the official classification of freight rates over the Lake Erie & Western Railroad; you may state whether that was on file in your office at the time you were freight and ticket agent at St. Marys."

237 Mr. Geer: We object to the leading manner in which this witness seems to have been testifying and the manner the questions are put him.

The Court: This testimony is read like a deposition and when leading questions are asked in depositions and objection not made at the time it is supposed to be waived.

Mr. Geer: I was not interested in this case on the former trial, but I conclude in reading this testimony we should have the opportunity to object when it is read and I am objecting to it now. And I am further objecting to it because not pertinent to the issue and it does not constitute any ground of defense in this case.

The Court: I think it goes in with the matter of classification here in this contract.

Objection overruled; pl'ffs except.

"A. Whether we had this here I couldn't say, there was a copy like this one file.

52. Like that?

A. Yes.

53. And look at this book, marked Defendant's Exhibit L, purporting to be an official classification of The Lake Erie & Western Railroad as to freight and state whether there was one like that on file in your office.

A. There was, yes.

54. Now, this Defendant's Exhibit K, for what purpose was that used?

A. That was used for the purpose of classifying freight.
55. Now, just explain how that was done."

Mr. McBride: There is no answer to this but some colloquy between court and counsel, which I omit and continue on, as follows:
"56. Mr. Zerby, in reference to Defendants' Exhibit K, which is marked "Official Classification #28", you may state until what time, if you know, that classification was in force on the
238 Lake Erie & Western Railroad."

Objected to as not pending or a defense against plaintiffs' claim. Objection overruled; pl'ffs except.

"A. Until number 29 took effect.
57. Now, when did Official Classification #29 take effect?"

Objected to; ob. overruled; pl'ffs except.

"A. I would have to see that to tell. That should take effect the first of the year, (examines them) January 1, 1907."

Motion to take answer from jury because not definite as he says "should take effect"; motion overruled; pl'ffs except.

"58. January 1, 1907?
A. Yes, sir.
59. Now, you may state if there was any what is known as exceptions to these classifications for shipment of freight.
A. Yes, sir.
60. And what are those exceptions; were they in writing and on file in your office?
A. They were filed in the office.
61. And you may state whether the exceptions that were so on file in the office to these Official Classifications #28 and #29 were the ones I here show you or like the ones I here show you.
A. They were exactly like these.
62. That would be Exhib-ts G, H and J?
A. Let me see them a minute. (They are handed to witness.) Yes, sir, Exhibit G is exceptions.
63. What are Defendants' Exhibit- H. and J; what were they used in reference to?
A. Exhibit H was a publication of the tariff rates or commodity rates, I meant to say.
239 64. And covered various articles?
A. It shows for itself what it is.
65. Now, go to Exhibit J.
A. Exhibit J was a joint freight tariff; it shows what it is, published class rates.
66. Now, Mr. Zerby, you may state whether these shipments, whether all shipments of live stock from St. Marys, especially the one on October 10, 1906, and March 6, and March 20, 1907, from St. Marys were made with reference to the official classifications, exceptions and commodity rates then in force."

Objected to; ob. overruled; pl'ffs except.

A. They were."

Mr. Geer: All this examination that has been read is entirely upon the part of the Lake Erie & Western Railway and they were dismissed from this suit, and I ask that all of that testimony just read be taken from the jury, and the jury be instructed not to regard it.

Mr. McBride: They can not change lawyers and play hot and cold. This testimony was taken for the benefit of both defendants at that time and here is the agreement right here to show it.

The Court: I think any depositions taken by any of the parties to the case can be used by any of the other parties to the case and it makes no difference on whose behalf the deposition was taken that drop out of the case. The person makes it his testimony by offering it in his own behalf and I think that is equally true with the former testimony of a witness, being offered for the Lake Erie & Western Railroad Company and also used by the Erie Company.

Mr. McBride: And there is the agreement there in the record.

Mr. Geer: Your Honor, that agreement is simply as to the kind of the testimony being given as to the testimony being taken out of order and that agreement is only as to the time and the place it shall occupy in the record.

240 Motion to take from jury overruled; pl'ffs except.

Mr. McBride: I will continue the reading:

"67. And you may state whether these live stock contracts, marked our Exhibits A, C and D, you have testified to, were made with reference to the classifications and exceptions for the shipments of live stock on file in your office.

The Court: He has already answered that all of them were so made.

68. Now, Mr. Zerby, another question. State what the fact is as to whether these shipments of October 10, 1906, and March 6th and March 20, 1907, were made under these live stock contracts, our Exhibits A, C and D.

A. Yes, sir."

Mr. McBride: I will now read the further testimony of said Zerby, as follows:

"And upon direct examination, by Judge Wolfe, for the Erie Railroad Company; as follows:

Q. 1. Now, Mr. Zerby, in the same line I wish you would take this Def'ts' Exhibit A, a paper writing purporting to be made Oct. 10, 1906—were you in your office for the Lake Erie & Western Railroad Company at that time?

A. I could not say.

2. You were there when these signatures were made?

A. No, sir, not when that was made. I might have been in the office.

3. I meant to say were you then a part of that company running that office?

A. Oh, yes, I was the agent.
4. Now, this purports to be—what is the rate on that contract?"

Objected to; ob. sustained, def't excepts.

241 Mr. McBride: We except and expect to show the answer would be, if permitted, "23¢ for a hundred pounds."

"5. Now, take the papers and tell the jury how you came to that; take the papers that were there at the time that rate was made, or copies of them, and show to the jury how you made that; show to the jury where you find that."

Objected to; ob. overruled; pl'ffs except.

"A. Well, in the first place the classification"——

The Court: What is he testifying from?
Mr. McBride: From some of these exhibits here.

"A. Well, in the first place the classification does not give the classification for live stock or horses in carloads and it is shown in the exceptions to the official classification, which is joint freight car #1663, Exhibit G, and is shown on page 7 on the item #52 "Live Stock in carloads subject to rules, conditions and special instructions of the official classification and return and condition specified in the *su*ual live stock transportation contract——
6. I do not care about that. Where do you get it? On page 7, item 52; what is that item?"

Objected to.
The Court: What is he testifying from?
Mr. McBride: From these exhibits here.
Mr. Geer: He is just reading from them, trying to figure ou'. and make a rate.
The Court: Doesn't the contract itself state whether it is a lower or higher rate?
Mr. McBride: Yes, sir. (Reading from the livestock contract.)
The Court: How can this help you now.
Objection sustained: def't excepts.

242 Mr. McBride: We except and expect to prove, if permitted, the answer would be 'as in the record it gives the classification for horses, ewes, cattle and sheep.'

"7. That is to Martel, is it not?
A. That is to territory applicable.
8. It is applicable to Martel?
A. Yes.
9. Now, what is that?
A. It is simply classified second class rate. But you have to refer to the tariff.
10. Now, go and get it, hunt it up.
A. Then you take Exhibit J, tariff #83, L. E. & W. Tariff Rate, and you find Martel on page numbered 6, St. Marys is page number 25, and you find the second class rate 23¢ for a hundred pounds.

11. Did you do that in this case; did you get it from that source and put it on the contract in this case?

A. The cashier or chief clerk did——

12. Well, it was done?

A. Yes, sir.

13. Now, what was done with that contract right then?

A. I would not be prepared to say what was done for the reason that I did not personally make it out.

14. But the custom is the man got one copy; what is the fact about that?"

Mr. McBride: There is no answer to this question.

Mr. Geer: We ask that all of the statements of this witness as to what was made out in those contracts be taken from the jury and the jury be instructed not to regard it as the witness said he did not make out these contracts. It was done by the Chief Clerk and Mr. Zerby did not do it himself and this motion applies to questions ten to fourteen inclusive.

243 The Court: Gentlemen of the jury, the testimony of the witness stating what the chief clerk did you will not regard or consider.

Motion so sustained.

Mr. McBride. The defendant- excepts to the ruling of the court in sustaining said motion as to the answers to each question separately and expect to prove were the answers permitted, the answer to each of those questions as stated.

"15. It was made and signed right there?

A. Yes, sir, it was made and signed right there.

16. Now, here is Exhibit B, contract of March 6, 1907, in this case: were you then in the employ of the company at that station?

A. Yes, sir.

17. And here is one, what is the rate in this contract?

A. 31½¢.

18. This is the Buffalo contract?

A. Yes.

19. How do you get that?

A. Get that in like manner as we did before only we use a different tariff, there being a published live stock car of commodity car, applying to Buffalo, which covers live stock and it is on page 2 of Exhibit H.

20. What do you find there?

A. We find the rate to — 31½¢.

21. Now, then, that 31½¢ is more than on this contract?

A. Yes.

22. Now, take Exhibit C, purports to be made March 20, 1907, and the rate is 31½¢ to Buffalo, was that found in the same manner?

A. The same manner.

23. Now, the time they were found and these contracts made

that you have referred to in your office subject to the inspection of shippers?

244 A. Yes, sir.

And upon further direct examination, by Mr. Gallinger; as follows:

Q. 1. Mr. Zerby, tell the jury how many, if more than one rate, different rates for transportation of freight were in force on the 10th day of October, 1906, and in March 1907, as to live stock.

A. As to live stock?

—. Yes, sir.

A. Carloads or less or in general?

2. No, I mean in carload lots.

A. There were various rates, you know, even in carload lots, some take class rates, some commodity rates, and some Carrier Liability a 20% higher rate.

3. Now, what rate was taken in regard to these shipments?

A. These were taken at regular rates, at class rates.

4. What class rate?

A. Published tariff rate at less rate.

5. At the lower rate?

A. Yes.

6. Now, was there a rate still higher than this, cost more money to the shipper?"

Objected to; ob. overruled; pl'ffs except.

"A. 20% more."

Motion to take answer from jury; motion overruled; pl'ffs except.

"7. What kind of rate was that?"

Objected to; ob. sustained; def't excepts.

Mr. McBride: We expect to prove, if the answer were permitted, that it would be "That is where the carrier assumed the liability."

"8. Now, this under these live stock contracts was a lower published rate?

The Court: He has said that.

245 9. Well, now, in what other way, if any, did the two rates that you speak of differ?

A. Why, they differed—with the twenty per cent higher rate the carrier would assume the liability for damages.

10. Now, were these two rates that you speak of denominated in any other way, the higher and the lower rate?

A. They were the 20% higher rate was the rate——

The Court: Whether they were called anything than the higher and lower rate; have any other name?

A. No, I don't know that they did.

11. Anything like first class or second class rate?

A. No, sir.

12. Can you tell us by looking at Defendants' Exhibit J where the different classes of rates for shipment of horses or live stock, on what pages that can be found?

A. Yes.

13. On what page is that, of what exhibit?

A. I take exceptions to the question. I can not answer it.

14. Now, on what page of that exhibit do you find that?

A. On this here tariff?

—. Yes, sir.

A. I answered that question. This here is a class rate and same rate might apply to something else outside of horses or anything else; the tariff does not say it applies to horses; you have got to get the classification with it, so that the tariff does not say in itself whether it is on horses or what it is; it is a joint freight card, published class rates of the different stations.

15. Are the stations numbered?

A. The stations are numbered to show the different classes from different stations.

246 16. The different classes of what?

A. Of freight.

17. Of freight rates. Now, how are those different classes of freight rates denominated?

A. From 1 to 6.

18. What does one indicate?

A. First class.

19. What is the next number?

A. Second class.

20. Now, there is a difference; they were denominated different than higher and lower rates; they were known as first class and second class rate-?

A. Yes, sir.

The Court: You mean to say there were six classes of rates for shipping horses?

A. No, sir, I was not asked that."

Mr. Geer: We ask that all those questions and answers about the six classes of rate- just read by Mr. McBride be excluded because it does not pertain to horses, for when the court asked him if he means six classes of rate- for shipping horses, he says, "No, sir, I was not asked that," and it is the questions on page 97, 13 to 21, inclusive.

The Court: He asked general questions of how many classes of rates and he answers from one to six and the live stock may be of one class. The only class we are concerned in is the class that pertains to the carrying of live stock and no other class and that is one of the six classes of which he speaks.

Motion overruled; pl'ffs except*s*.

"21. How many rates were there for carrying horses?

A. Well, there was a rate for lots carloads, that is, when parties

would not accept the live stock contract, limited liability,
247 then it would be 20% higher rate. Now, that would apply to carloads or less than carloads and in carloads there would be second class and 20% higher. Now, that would not come under first class; that is, a 20% would not necessarily be first class, but might be a little less or a little more.

22. And at what rate were these horses shipped to Buffalo?

A. at 2nd class rate, 31½¢—no, not to Buffalo. To Buffalo they were shipped under commodity tariff, 31½¢.

23. Martel?

A. The second class rate. No commodity rate to Martel.

24. Now, what was the amount of charge, what was the amount of charge to Martel?

A. The amount on the car?

25. Yes, about what were they for transportation?

A. 23¢.

26. What was the rate as to these horses shipped in 1907 to the Crandall Horse Company at Buffalo?

A. 31½¢.

27. Do you know how far it is from St. Marys to Lima?

A. We call it 22 miles. It is not quite 22 miles.

28. Tell the jury whether the Erie Railroad and The Lake Erie & Western, whether these two roads cross at Lima?

A. They cross at what is called South Lima.

29. Is there an Erie Railroad at St. Marys, Ohio?

A. No, sir."

And thereupon Mr. Geer reads cross-examination, as follows:

"And upon cross-examination, by Mr. Barker; as follows:

Q. 1. Mr. Zerby, is not the office there at St. Marys partitioned; is there a partition in it, one part separating the public from your office?

248 A. As to now or then?

2. Then, October 1906 and March 1907.

A. There was a freight and ticket office in the one and there is a waiting room on both sides of it, and there is a wooden partition between or the office is partitioned off by a wooden partition.

3. It is in two parts?

A. Yes.

4. And one part is where you worked, and the other part where the public stands?

A. Yes.

5. There is a ticket or wire separation, pigeon hole, where you did business for the public?

A. There is a pigeon hole or window there.

6. Now, all these exhibits they showed you here regarding classification rates were on which side of that partition?

A. They were on the inside, in the office.

7. And where were they in your office?

A. At the cashier's desk.

8. Outside where the public could get them?
A. No, sir, they were inside.
9. Now, did you ever tell Stone & Noble or Smith that there were two rates there?
—. ——.
10. Did you ever have any conversation with Stone & Noble or Smith regarding any different rate other than thise live stock liability?"

Mr. Geer: There is no answer to that, so I will continue, and there is none to question eleven:

"12. You were there on this second load, March 6, 1907, and you signed that up?
A. Yes, sir.
13. Can you recall just now how that was done then?
249 A. In a general way.
14. Well, do you recall specifically what happened there at this one occasion. I don't mean the custom, but just what happened there at that time?
A. Not specifically. I would have to speak in a general way.
15. Where was this card, Defendants' Exhibit F, where was that posted or one like it?
A. It was posted between the window, the freight window, what we call freight window, where they put their business through, and the door coming into the office.
16. And you had no tariff classification or official classification of tariff such as are shown here by Defendants' Exhibits L, H, G and K, where the public stood or did business?
A. We do not.
17. Now, in the determining freight on horses, as I understand you, you must determine its classification: is that correct?
A. Yes.
18. Now, what is the next step that you take?
A. Look the tariff up and find the rates.
19. That is for that numbered classification?
A. Sure.
20. Did Mr. Stone and Noble ever come to you and ask you for a special rate on some horses to be shipped out of St. Marys?"

Objected to; ob. overruled; deft's except.

"A. Not to my knowledge. They might but I don't know.
21. Do you recall ever telling them that you had but one rate on horses?
A. I did not.
22. You never did tell them that?
A. No, sir.
250 23. Do you remember two or three times that they came down and wanted to know if they could get a special rate through to Galion?"

Objected to; ob. overruled; def't excepts.

"24. You never did, did you say?"

Objected to; ob. overruled; def't excepts.

"A. I don't remember."

Judge Wolfe: I will now read the remainder.

Mr. Geer: We object to the remainder as it is upon the part of the Lake Erie & Western Railroad Company.

Objection overruled; pl'ffs except.

Judge Wolfe reads, as follows:

"And upon redirect examination, by Mr. Gallinger, as follows:

Q. 1. This notice, our Exhibit F, that you say was posted up, "Tariffs of this Company on file in the office and open to public inspection," tell the jury whether that was placed in that depot at St. Marys in such manner as people could see it?

A. It was placed right along side of the door——

2. No, listen. The jury would not know how that is, can't you tell us generally whether the paper was placed in that depot in such manner as people could see it.

A. I will tell you just how it was; the window came up about there; (indicating waist) and this notice was placed on the side of the window about 18 inches above the counter so that anybody coming along there couldn't hardly help but to see it, because it was just about level with the face."

Mr. McBride: I will now read the testimony of William L. Werts on the former trial of this case, as found in the bill of exceptions, page 107, as follows:

"W. L. WERTS, who, being duly sworn, upon direct examination, by Judge Wolfe, testifies, as follows:

251 Q. 1. State your name to the jury.

A. W. L. Werts.

2. Where do you live, Mr. Werts?

A. Hartford City, Indiana.

3. And where did you live in 1906 and the early part of 1907?

A. In St. Marys, Ohio.

4. What was your business at that time?

A. I was cashier of the L. E. & W. at that place.

5. That is, The Lake Erie & Western Railroad Company?

A. Yes.

6. Are you still in the employ of that company?

A. Yes, sir.

7. Now, as cashier of the company where is your office?

A. At the freight office, freight station.

8. And how was your office at St. Marys bound; what offices in the same building?

A. We had three departments; the freight and ticket department in the center and two waiting rooms on each side.

9. What was your business, how many departments did you take care of?

A. I took care of the cash and freight.

10. Did you take care of the ticket?

A. Nothing only the receipts for the tickets and took care of the bills.

11. I hand you our Exhibit A and ask you if you have ever seen that Exhibit A before.

A. Yes.

12. And this, our Exhibit B, how about that?

A. Well, I don't know as I have ever seen that before.

13. I hand you our Exhibit C; what about that?

A. I have seen that one.

252 14. Whose handwriting is the contract or bill therein, those two exhibits; whose handwriting outside of the signatures?

A. In Exhibit A I made out that contract; Exhibit B was made out by Mr. Zerby and Exhibit C was made out by myself.

15. These exhibits state in Exhibit A a rate of 23¢. That is to Martel, and in Exhibits B and C a rate of 31½. Now, can you from—I now pass up to you our Exhibits H, J, K and L and I want to get to the point whether these are the only exhibits necessary to determine these rates; examine them and see.

A. Well, it depends upon where you want to ship to.

16. Well, now, assume that the shipments go to Martel and Buffalo.

A. Yes, sir, these are all that are necessary.

17. Will you take our Exhibit A and determine and explain to the jury how you find, if you are able to find it, this 23¢ rate for the shipment of horses from St. Marys to Martel.

A. Well, in the first place I would want to know if anybody was going with the horses and if they were, I would take this classification in force at that time, October, 1906, this Exhibit K, and find out.

18. Go to the page so we can know the page.

A. Well, I go to page 92 and look under Like Stock to see what class it took. But this does not show—we have what is called exceptions to the official classification and that is exhibit G, and I turn to page 7 and it shows line under Live Stock and says, "Horses and Mules take current 2nd Class rate." And then I go to the tariff to find out what current 2nd Class was and that is this Exhibit J and it shows on page—that's our station number, 25, and we have to go to that to find out our class rate and the 2nd Class rate from St. Marys to Martel would be 23¢.

19. Now, take the next one, the one of March 6th, 1907, our Exhibit B, naming those exhibits as you turn to them, find what we have here where you find that.

253 A. Well, I would pursue the same course as I did on the other; turn to the official classification in effect at that time in March, 1907, that would be Exhibit L.

20. March 6th?

A. To take effect January, 1907, and see what class live stock to go, which shows as before by referring to the official classification and exceptions, take 2nd class rate.

21. In what exhibit do you find that?

A. On Exhibit G and page 7, but we sometimes have what is called special commodity rate on live stock, horses, mules, etc., and that as a rule makes the rate less than the regular second class rate, and if that was in effect at the time we use that rate.

22. Was it in effect?

A. Yes, at that time. And that shows the rate from St. Marys, Ohio, to Buffalo, New York, was 31½¢.

23. That commodity rate is in what exhibit?

A. Exhibit K.

24. Now, then, what is the shipment of March 6th then; is it the commodity rate?

A. Yes, sir, it is the commodity rate.

25. Now, turning to Defendants' Exhibit C, tell what is necessary to show where you get the rate of 31½¢.

A. The shipment was made to the same place, Buffalo, New York. The Tariff in effect same at time of shipment so you go through the same course.

26. Can you tell on these exhibits how much was paid by the shipper, if anything was paid, and, if so, see how much.

A. I can tell whether they were prepaid.

27. Well, now, do so.

A. Exhibit A the freight was prepaid, that is, providing the horses did not exceed twenty in number, the minimum 2000
254 pounds, rate 23c would make the prepayment $46.00. I see I have got it noted.

28. Was that prepaid?

A. Yes, sir, by the shipper.

29. Is that $46.00 the rate that is fixed by this contract?

A. Yes, sir, it is.

30. Turn to our Exhibit B and state what the fact is.

A. This is not prepaid.

31. Can you show anything and, if so, do so, to aid us, any reason why, I wish you would turn to it.

A. If it was prepaid, it would have been marked on the contract.

32. Now, is there any rule or reason why that was not prepaid; anything in the shipment and where it was going?

A. It is not necessary for it to be prepaid.

33. Now, go to Exhibit C, and state what the fact was there.

A. That was not prepaid.

34. These two that you say are in your handwriting, what were they, whether copies or the contract you wrote on yourself or how were they made?

A. We called them a limited liability live stock. You want to know how I made them out?

35. I want to know how these were made, whether single, double or how.

A. Well, they were made in this manner: there is a pad of them and when the shipper bills out a car of stock, anything of this nature, well, a car of horses, the carbon is slipped in between two contracts of this nature and I write in copy and that makes an exact copy underneath. That is the copy of the original.

36. Which is on top when you wrote?

A. The original.

255 37. And the one you have in your hand would be underneath the original?

A. Yes, sir.

38. Is that so as to Exhibits A, B and C?

A. Yes, sir.

39. What is a carbon?

A. Well, a carbon is something similar to a piece of paper and thin and when you write on it it makes an impression on the other side just exactly what is written on top.

40. Carbonized on one side like lamp black, printed?

A. Yes.

41. That's what it is?

A. Yes, that's what it is.

42. Now, at the time these three drafts were made was there in the office where you were attending to the business these exhibits from which you get these rates as you said?

A. Yes.

43. And where were they kept?

A. Kept on file there for our own use and the public's use.

44. State where they were on file.

A. Take for instance these two and we had two of them; I kept one in my desk and the bill clerk kept another just exactly like it.

45. That was in the office inside from the public?

A. Yes, sir.

46. Now, what means had you, if any, to apprise the public that there were such things there?

A. Well, we had a notice posted up.

47. I hand you our Exhibit F and ask you whether that is like the one you had posted up?

A. Yes, something."

Question objected to and motion to take answer from jury; objection and motion sustained; def't excepts.

256 "48. Where was that put up?

A. On the wall room on the outside."

Question and answer objected to; ob. sustained.

"49. And was that kept there all the time?

A. Yes, it was nailed there."

Question and answer objected to; ob. sustained; deft. excepts.

"50. Was it there during the time these contracts were made?

A. This was not but something similar to that."

Question and answer objected to; ob. sustained.

"51. Well, I meant something similar to that.
A. Yes, sir."

Question and answer objected to; ob. sustained; deft. excepts.

Mr. McBride: We expect to prove, if permitted, that the answers, each of those answers to each of those questions were made as set out in the record.

Mr. Geer: I will read the cross examination of Mr. Werts, as follows:

"And upon cross-examination, by Mr. Barker, as follows:

Q. 1. Where in those exhibits, Mr. Werts, do you find your station number?

A. It shows usually on the back part.

2. Back part of each exhibit?

A. Take this shipment to Martel, it shows back here, "St. Marys, Ohio, Station No. 25.", Exhibit J.

3. So in order to find the freight bill in any particular instance how many different sheets or books did you have to refer to?

A. In order to find freight bill?

4. The freight rate.

A. Well, you should have to refer possibly to two or three.

5. Well, how many would you say?

A. Well, in this case you would have to refer to three.

6. You could not find them on a single one?

257 A. No, sir.

7. The place where you kept these exhibits was not open to the public; it was not in the public waiting room?

A. We kept them in our office.

8. Your private office; was that open to the public, the general public, the part you occupied there?

A. No, sir.

Judge Wolfe: But that Exhibit F?

A. That was in the public waiting room.

9. Only Exhibit F was in the public waiting room?

A. Yes, sir, tacked to the wall.

10. And the other exhibits, they were not in the public waiting room?

A. No, sir, and not necessary. Now, take that live stock contract sometimes we had the body of those written outside."

And thereupon Mr. McBride reads the re-direct examination, as follows:

"And upon redirect examination, by Judge Wolfe; as follows:

Q. 1. There are other rates—you call 2nd class commodity rates, were they all found in these books?

A. I do not understand you.

2. You had other rates; we speak of this rate being special com-

modity rate 31½ to Buffalo and 23¢ 2nd class rate; now, had you other rates in these books?

A. Oh, we had other rates.

3. Are they found in these books here generally?

A. To Martel?

4. Yes, or to Buffalo?

A. Not to Buffalo.

5. They are to Martel?

A. Yes.

258 The Court: Do I understand only one rate to Buffalo and two to Martel?

A. No. I can explain that if you want me to; horses take 2nd class rate to Buffalo providing you don't have special commodity rates.

The Court: If you have a special commodity rate?

A. One rate we use, that is, the lower rate.

The Court: What is that?

A. Special commodity rate.

The Court: Does that mean one rate to Buffalo?

A. Not exactly; depends on the shipper; he could have taken another rate if he had wanted to. There is what is called a higher rate, that is, providing he didn't assume the liability shown on live stock contract.

The Court: Was that to Buffalo at that time?

A. Yes, sir, to any place you wanted but 20% higher.

The Court: They had those two rates as well as special commodity rate to Buffalo?

A. Yes.

By Judge Wolfe:

Q. 1. And also to Martel?

A. Yes, sir.

By Mr. Barker:

Q. 1. Did Messrs. Stone and Noble ever come to you and ask you as to special rate to Galion on some horses?

A. Not that I remember of."

Mr. McBride: I now offer in evidence this red card, our Exhibit F, referred to by this witness and Mr. Zerby.

The Court: It may be offered as an exhibit to Zerby's testimony.

Mr. Geer: We object to it as not having been properly identified.

259 The Court: Only as to Zerby's testimony and not Werts'. Objection overruled; pl'ffs except.

Said red card admitted in evidence, hereto attached, marked "Def't's Exhibit F", and made a part of this bill of exceptions.

Mr. McBride: I will now read and exhibit it to the jury.

Mr. Geer: We object.

Objection overruled; pl'ffs except.

Mr. McBride: I now introduce in evidence Joint Freight Tariff, 1663, our Exhibit G, and I will exhibit and read it to the jury.

Mr. Geer: We object to that.

Objection overruled; pl'ffs except.

Said Joint Freight Tariff exhibited and read to jury and admitted in evidence, hereto attached, marked "Def't's Exhibit G", and made a part of this bill of exceptions.

Mr. McBride: I offer in evidence commodity rate, our Exhibit H and read and exhibit it to the jury.

Objected to; ob. overruled; pl'ffs except.

Said Commodity Rate exhibited and read to jury and admitted in evidence, hereto attached, marked "Def't's Exhibit H", and made a part of this bill of exceptions.

Mr. McBride: I now offer in evidence Joint Freight Tariff, our Exhibit J, and read and exhibit same to jury.

Objected to; ob. overruled; pl'ffs excepts.

Said Joint Freight Tariff read and exhibited to jury and admitted in evidence, hereto attached, marked "Def't's Exhibit J", and made a part of this bill of exceptions.

260 Mr. McBride: I now offer in evidence Official Classification, No. 28, our Exhibit K, and read and exhibit same to jury.

Objected to; ob. overruled; pl'ffs except.

Said Official Classification No. 28 exhibited and read to jury and admitted in evidence, hereto attached, marked "Def't's Exhibit K," and made a part of this bill of exceptions.

Mr. McBride: We now offer in evidence Official Classification, No. 29, our Exhibit L, and read and exhibit same to the jury.

Objected to; ob. overruled; pl'ffs except.

Said Official Classification No. 29 exhibited and read to jury and admitted in evidence, hereto attached, marked "Def't's Exhibit L", and made a part of this bill of exceptions.

Mr. McBride: I now offer and read to the jury the deposition taken at Buffalo, with others, of Harry P. Madden, as follows:

"HARRY P. MADDEN, of lawful age, being by me first duly cautioned and sworn and examined by Mr. Hellings for defendants, deposes and *swore*, as follows:

Q. You live in Buffalo, Mr. Madden?
A. I do.
Q. Are you employed by the Crandall Horse Co.?
A. I am.
Q. How long have you been employed there?
A. Eight years.
Q. In what capacity?
A. Why I am President of the Company and look after the selling of the horses, anything thats should be done around the place.
Q. You were employed — the Crandall Horse Company during March, 1907?
A. Yes.

261 Q. I understand that you have charge of the selling of the horses received by this Company, any shipment from out of the state?

A. I have.

Q. Do you remember particularly two carloads of horses shipped from St. Marys, Ohio, by Messrs. Stone, Noble & Smith Consignors, consigned to the Crandall Horse Co. at East Buffalo, N. Y., and arrived at East Buffalo, N. Y., on Saturday March 9, 1907, and Saturday March 23rd 1907, respectively?

A. Well, I don't remember about one car,—we have so many,—one car I do remember about, the car of March 24rd.

Q. Didn't you have anything to do with the car on March 9th?

A. Yes, but I don't remember the circumstances, we had seven or eight hundred horses in here at that time. My attention wasn't called to this in any particular way I remember now. There is nothing that I can remember about that car of horses any more than any other car of horses that I have.

Q. Do you know whether you sold those horses when they arrived?

A. Why I helped to sell them, no doubt.

Q. But did you keep any record of the sale?

A. We have a record of all those sales, yes.

Q. How are those records kept?

A. Well, we have an Auction Book which we kept in our auction ring at the time that will show how these horses were sold.

Q. Who makes that out?

A. Our Clerks.

Q. You don't make it out personally?

A. No.

Q. If you will explain just what way you are connected with sales—do you personally auction any of the horses off?

A. No, I do the lung work.

262 Q. And by that you mean?

A. Well, you hit them on the back, get bids from different buyers and try and get all the money you can out of them."

Mr. McBride: Here follows a question and — objected — by Mr. Cole and we object to it and its answer and also the next question and answer by him.

Objection overruled; def't excepts.

"By Mr. Cole:

Q. Run them up and down and holler and yell?

A. Yes.

Q. Say "Come on boys and bid on them"?

A. Yes."

Mr. McBride: Now we ask that those answers to those questions by Mrs. Cole be taken from the jury and the jury instructed not to regard them.

Motion overruled; def't excepts.

"By Mr. Hellings:

Q. This Auction Book that you speak of, you say is kept by a clerk in the ring?

A. Yes.

Q. What is done after that?

A. Then it is transferred; then the clerk also has an assistant with him that keeps a card of the man that purchases the horse. You might have twenty head of horses out there and they might be out of twenty different loads. They are run onto that card and then they are got from a card into what we call our sales book, part of our set of books, and posted from the sales book to the different individual accounts that they belong to.

Q. Does the clerk that makes the sales in the Auction Ring make the entries in the auction book?

263 A. Yes, the man that keeps account of the sales in the Auction Ring makes the entries. When a horse is brought up to be sold why we call out how we are going to sell the horse, whether he is sound, or useful sound, of wind-work, and he makes a record of it in the book.

Q. Can you remember this car of horses on March 9th, if you can go over those books, refresh your recollection from the books, would you remember the individual horses and the condition?

A. No, I couldn't, that would be impossible; couldn't do that because there wasn't anything—my attention wasn't drawn to this car of horses any more than it would be to 25 other cars of horses that was sold the same day. The Auction Book would show whether they were bruised up or anything like that, you know. Some of the horses might *of* been sick and sell at the halter; our Auction Book of that date would show them that this car of horses was sold, it would show the condition the horses were sold under. (Witness consults a book stamped Car Book) We received them in our barn the morning of March 10 at 4:00 a. m. That is a record we keep of horses received in the barn.

Q. I show you book marked "Car Book, what is this?

A. That is a Car Book of 25 loads of horses unloaded, we keep a record of the time they are unloaded, what railroad they come from and all about it.

Q. The entries are made according to shipment?

A. Our foreman makes those entries according to the way he received the shipment; that is, when they are received and when they are shipped out—some of them we shipped out, you see there is entries made where they are shipped to (Indicates). I show you page fourteen of the book, third entry on the page which reads 'March 10th, 4 a. m., H. M. Stone 23 head, Erie R. R., car No. 67967, blue barn": what does that entry mean?

264 A. That means they were located—we have nine different barns here on the front, and have some barns over on the other side, here is some horses that were in barn one, those were in barn three, here's some that goes in that part of the barn, barn nine.

By Mr. Cole: What he means is—that is the time you received them?

A. That is the time they came to our barn.

By Mr. Hellings:

Q. Is that the shipment that is referred to here as being received on March 9th?

A. That must be the shipment, they come in our barns March 10th according to our records.

Auction Book produced.

Q. Now, I show you book called the Auction Book, the entries made in March 11th, 1907, and ask you if you find there any entries relating to the shipment of horses above referred to as being received on March 10th, 1907.

A. These are fifteen of the horses received at that time—how many were there in the load—23.

Q. Go back and read the first entry.

A. First horse h-re is Bay Mare—do you want the description and particulars?

Q. Yes?

A. Bay Mare #917, sold sound $157.50, sold to Bantell. Next Brown Mare 913 sold for $142.50, sold sound with age, that would mean "age" means horses 8, 9 or 10 years old.

Q. To whom?

A. To Bovenvier, next is a grey mare which was rejected; I don't know what became of her (runs down the book) here she is, Grey Mare #905.

By Mr. Cole: Read the whole thing, of the sale first.

A. Sold first o. k. $125. to man by name of Burch.

Q. Number?

265 A. 905.

Q. Then what?

A. Rejected and re-sold for $117.50, wind and work, lame, bruised.

Q. To whom?

A. To Palen. No. 902. A Gray Mare, sold sound for $125.00 Kraft.

No. 914, Bay Horse $130.00, sold sound with age to George Dennis.

No. 916, gray horse $157.50 sold sound with car business to George K. Horton.

No. 924, gray mare, sold sound $70.00, Male.

No. 903, Bay Mare wind and work with age $95.00, Birdsey.

Brown horse No. 909, $192.50, sold sound to Murray.

No. 908, now this horse was re-sold, 908 sold for $212.50 to Stevens.

Re-sold for $212.50?

A. No, he was sold; rejected for being sick, was windy, re-sold to Horton as a "worker only" for $172.50.

No. 912 sold sound $147.50 Bantell.

No. 923 sold sound to Palen $117.50.

904 must of been lame, she was sold to "wind-work to Bovenizer, $125.00.

911, let's see, what became of 911, must of come in here again some place, he wasn't sold in the auction—911 was sold in the auction once to be sound barring car bruises for $150.00 to Bantell; then he was rejected, re-sold to Sanders for $117.50, to have car bruises.

Rejected again.

By Mr. Helling. The list you have just read comprises fifteen of the horses out of the shipment?

A. I don't thinks there was that many. (Counts.)

Q. How many actual sales does that list comprise?

A. Result of the count shows thirteen actual sales.

Q. Does this book contain any record of any sales except those that are made at auction?

266 A. No, no, the rest of them went——

Q. Where is the record, or do you know what disposition was made of the other horses?

A. Well, we can find by turning to our books; most of them we sold during the day; maybe some of them we sold a week later; some were sold on the 12th Friday.

Q. Are you able to tell from this book the condition of the horses?

A. No.

Q. Or anything regarding their description except what appears there?

A. Nothing only what is shown here.

Q. What is the meaning of the term "Wind and Work" that appears there?

A. A horse may be lame, might have his leg cut, something that would cause him to go lame or he might be blind.

Q. You mean some defect in the horse?

A. Yes.

Q. Which would affect the selling price?

A. Yes; we have different terms.

By Mr. Cole:

Q. Horse couldn't have any kind of a defect except that you thought would interfere with his wind or work, which?

A. Well, no, our terms are understood, when horses are coming off the cars and have a kick and be lame, or would have a kick up in the auction room and be lame, he would be going sound, we would call—"Wind and Work".

Q. In other words that is another term for "unsound" horse?

A. Unsound horse, and the horse might be blind, and we couldn't guarantee him but wind-work.

By Mr. Hellings:

Q. That term doesn't necessarily mean that the horse was injured during the shipment?

267 A. No.

Q. I show you another book, what's this? (Shows book.)

A. That is "Stock Ledger."

Q. How is that made up?

A. Well, the horses are entered here; the time they are received in the barn here you will see, that is taken from that Car Book, you see, the horse is received in the barn on March 10th, A. M., 23 horses, number of the car is there 67967. We number our horses on the halter with consignee's (consignor's) name on the halter ticket, the 23 head were numbered from 902 to 924. Grey mare No. 902.

Q. The entries in this book——

A. Those are the correct sales—that is, what the horses brought.

Q. Are a combination of the horses in the Auction Book and Car Book referred to?

A. Yes, sir.

Q. Will you read the list of entries that appear on page 276 of this book?

A. You mean description?

Q. Yes, just turn and read it in the way you did before.

A. 902 is a grey mare, sold for $125.00; she was sold at auction; sold on the 11th—do you want the dates?

Q. Yes.

A. On the 11th. No. 903 is a bay mare, sold on the 11th at auction, $95.00. No. 904 is a bay mare, sold 11th at auction, $125.00. No. 905, grey mare, sold 11th, auction, $117.50. No. 906 is a brown horse, sold private on the 11th, $175.00. No. 907 is a grey mare, sold on the 11th, Friday for $165.00. No. 908, brown horse, 11th at auction, $172.50. No. 909, brown horse, 11th, auction, $192.50. No. 910, grey horse, sold private, $190.00. No. 911, bay horse, sold on the 12th, private, $110.00, that is the horse we lost track of there, do you see? No. 912, a chestnut horse, sold
268 on the 11th at auction, $140.00. No. 913 is a brown mare sold on the 11th, auction, $135.00. #914, brown horse, 11th, auction, $120.00. #915 bay mare, 11th, private, $155.00. #916, grey horse, 11th, auction, $157.50. #917, bay mare, 11th, auction, $152.50. No. 918, grey horse, and #920, chestnut horse, sold on the 10th, private, $155.00.

Q. For the two of them?

A. For the two. #919, grey horse, 11th, auction, $175.00 #921 and #922, bay horses, 11th, private, $450.00.

Q. For the two of them?

A. For the two, yes. #923, bay horse, sold on the 11th, auction, $117.50. #924, grey mare, 11th, auction, $70.00.

Q. That list which you have read contains a record of each horse?

A. That is a complete record. I will tell you, Mr. Stone might sell some horses out there in the ring, you know, and the horse might have some little defect that wasn't called, that we do overlook in selling the horses, and this gentleman might buy it up, and we might go to him and cut off a five dollar bill or something like that, that is often the case; that is the reason those first prices will be compared with those auction prices, because I noticed there was one place a difference of $5.00.

Q. Is there anything in those prices to show whether the horses at time of sale had defects which are due to transportation?
A. Nothing in those entries to show it, no, sir.

By Mr. Cole: You haven't stated at this last statement, *statement* that he has given is a correct account of the sales of the horses both at auction and at private sale?

A. Yes, that's right. You want to compare those prices with the last prices given up there, and as I say where there were one or two horses changed from—I saw one horse, horse No. 917, \$152.50, the first account we took out of this book it was
269 \$157.50.

Q. You can fix that by saying there might be a difference in the sale price?
A. From the Auction Book and complete record.
Q. But the complete record that you have last given, is correct?
A. Is correct.

By Mr. Hellings:

Q. Who would know the condition of the horses at the time they were sold?
A. Why I don't know anybody that knows the condition any better than the man that sits in here, Mr. Stone, who was the man, did you have a veterinary look after them?"

Mr. McBride: Here Mr. Stone gets into this deposition, the plaintiff in the case and asks a question and we object to this.
Mr. Geer: The witness refers to Mr. Stone in his answer and then Mr. Stone makes a statement.
The Court: No, that would be improper. His deposition is not being taken. I will sustain the objection.
Mr. Geer: I acquiesce in the court's decision.

"By Witness: My attention wasn't called to any injury of the horses in the first load, on March 10th only one horse what I had reference to, my attention was called,—there was one horse in the load that my attention was called to, after it was sold, because one of the horses that was sold to Wolf for \$155.00, bay mare, I will give you her number, No. 915, sold to New York shipper by the name of Wolf for \$155.00." Objected to because witness was talking to Stone; "Ob. overruled; def't excepts.

"By Mr. Hellings:

Q. What did you notice about that horse?
A. I noticed that she was taken away to the hospital sick, and Wolfe came to me and wanted to reject the mare, took me over and looked at the mare and I wouldn't stand for it, he took
270 the mare, and she died for him, and he paid for her."

Mr. McBride: I do not think that is complete and I ask the court to take it from the jury. No, I will let that stay in.

"Q. You keep any record of the condition of the horses at the time of sale other than you have read?
A. No.
Q. There is no record kept of the injuries from which the horses were suffering?
A. No."

Mr. McBride: And here Mr. Cole makes an improper statement, which I will omit.
The Court: Yes, that is improper.
Mr. Geer: I will not insist on that.

"By Mr. Hellings:

Q. Did you also have charges of the sales for the shipment of horses received on March 23rd?
A. I did.
Q. Have you got a list of any of these books of horses that were received and disposed of?
A. Yes, we have the record here when they were received.
Q. That record compares with the book last referred to?
A. Yes, and also with these other books, this is the corrected list. We can give you the numbers here, and then we can turn to the Auction Book from these auction numbers here, and tell you under what conditions the horses were sold, that will save that extra work you had before all right (reads) here is received March 23d, sold on April 1st, different dates from that time until March 1st.

By Mr. Cole:

Q. Give just exactly the time they were received at the barn.
A. 2:30 p. m.

271 By Mr. Hellings:

Q. What do you call this book?
A. "Receiving and stock ledger."
Q. And this list appears at page 318 of the stock ledger, will you read what appears there on that page as far as it affects Mr. Stone's shipment?
A. All right, there must be—that must of have been April there, some of them carried over to April yes, they were.

By Mr. Cole:

Q. Tell when they were received to sell.
A. March 23rd at 2:30 p. m.

By Mr. Hellings:

Q. 1. In the Erie car?
A. Erie car No. 67944, now do you want the description of how sold and particulars, do you?
Q. Yes.
A. And date?
Q. Yes.

A. No. 444, bay mare, April 1st, sold at auction for $212.50, that is auction No. 167 (compares with auction book and reads) sold sound. No. 445, grey mare, April 1st, sold at auction, $$127.50, sold sound. #446, bay mare, March 26th, private $205.00. #447, chestnut mare, sold Mar. 26th at auction $70.00, "Useful, sound, car bruises, and age." #448 grey horse, sold private 24th of March, $200.00. #449, grey mare, and #450, black horse, sold at auction, March 26th, $140.00, sold without a guarantee, now that is the pair of horses that were hurt. I remember a grey mare and black horse. I remember that pair of horses now they were in such condition we couldn't give any guarantee with them at all,
272 they were not in condition to sell at or work or wind, or anything, they were all tramped on and lame and we sold them just as they stood at the halter, without any guarantee.

Q. What particularly was the matter with, did you notice?

A. Well, I didn't notice them anything in particular, but they were all bruised up and lame. #451 is a grey horse, sold private March 30, $125.00. #452, grey horse, private, Mar. 24, $235.00. #453, grey mare, Apr. 1, Auction $110.50 sold "work only" no guarantee, she might be mean in the stall, or might be kicky, or might be heavy, don't know why we sold her, or windy, don't know why we sold her "worker only," only there was some reason of that kind. #454, black horse, Mar. 24, sold private $235. #455, sorrel horse, Apr. 1st, sold at auction $145.00, "useful, with age." #456, bay horse, Apr. 1st sold at auction $87.50, sold as a "worker only." #457, Apr. 1st, grey mare, sold private $120.00. #458, black mare, Apr. 1st, auction, $190, sold "useful, sound with car bruises." #459, grey horse, Mar. 30, and #462, grey horse, Mar. 30, sold private $425.00. #460, roan horse, he died—dead. #461, bay horse, Apr. 1st, sold at auction, $155, sold "with car bruises, useful, sound." #463, bay horse, Mar. 25, private, $210. #464, brown horse, Mar. 24, private, $225.

Q. That list as you read comprises how many horses?

A. 22.

Q. They were all sold except one?

A. Except one.

Q. All the horses in the first list you read were sold according to your record?

A. Yes.

Q. You said that this second shipment was called to your attention, now I wish you would state——

A. Well, it came in here we had an awful large run of
273 horses, had every barn over in the front full, and he came in, and we put him upstairs over there in the blue barn, and his horses got in late and looked shipped to death as we call it, looked gaunt, looked like they hadn't been fed or watered, or had been delayed on the road, and this one of the horses was sick and he called me up to see these horses, and I thought the horse was sent right to Claris, but there is no record of it here. (Indicating his book.)"

Mr. McBride: We object to this statement made by Mr. Stone.

Objection sustained.

Said statement being, "Mr. Stone explained that the horse died in so short a time that Claris (the Veterinary Surgeon) made no charge.

Q. Did you examine each of the horses in this shipment?

A. No.

Q. Do you remember any of the other horses particularly, except the one that was dead?

A. No, I can't say that I do, only the condition of the load at that time that my attention was drawn to it, when they looked like what we call "Shipped bad," this one horse, the road horse, I know we pulled him out, and saw that he was very sick, and told Mr. Stone, I said "you send that horse right over to Claris."

Here Mr. Geer reads the cross-examination, as follows:

"Cross-examination, by Mr. Cole:

Q. Do you mean by "Shipped bad" they looked gaunty and rough?

A. Yes.

Q. Did you notice any cuts or bruises on any of the other horses except the one that died?

A. No, I didn't because we didn't pull any of the other horses out, only we just walked behind them as they were in the stalls.

Q. You didn't examine closely any of the other horses?

274 A. No, I didn't.

Q. You didn't?

A. Except on this, there was one pair of horses there, that pair was sold for $140.00, they were all cut up, the grey and the black, I noticed them.

Q. You noticed them?

A. I noticed those two horses.

Q. Do you remember how they were cut up?

A. No, I don't. I remember that they were bruised up, but don't remember in what way.

Q. You didn't have Claris examine these horses?

A. No.

Q. Your attention—you were not asked to examine the first shipment at all?

A. No, never saw them—I say I never saw them, of course, I saw them, but he didn't say anything to me about it or I to him, all I know about them, he sold them in the ordinary way, like you know, anybody's else load of horses.

Q. And the second carload you only examined generally?

A. That is all, he called my attention to this roan horse, and this pair I remember.

Q. And that's all you examined?

A. That's all.

Q. How many horses did you notice as gaunty and shrunken and rough?

A. I couldn't say for that, like any load of horses that is on the car.

Q. Did the whole car look like that?

A. They all looked as though they wanted water and feed, as any carload would when come in the barn.

Q. How does the horse look when he looks as though he needed water and feed?

275 A. Look shipped out and gaunt.

And here Mr. McBride reads redirect examination, as follows:

"Redirect examination by Mr. Hellings:

Q. You can't say positively, can you, that any of the injuries that you noticed in these three horses, were due to shipment?

A. No, I couldn't say that.

Q. Just noticed the injuries which you specified and that's all?

A. That's all.

Q. You don't know how they occurred?

A. No, only I know that they were there when they come in our barns, that's all I know about it."

Mr. McBride: I will now read in evidence the deposition taken at the same time as the others before the Notary, Ferdinand E. Finsterbach, of Thomas McLaughlin, as follows:

"THOMAS MCLAUGHLIN, of lawful age, being by me first duly cautioned and sworn, and examined by Mr. Hellings for defendant, deposes and *swire*, as follows:

Q. Do you live in Buffalo?

A. Fort Erie, Ontario.

Q. And you are employed by the Crandall Horse Co.?

A. I am.

Q. In the capacity of bookkeeper?

A. One of the bookkeepers.

Q. And you were so employed on March 1907?

A. Yes, sir.

Q. March and April—do you know in whose handwriting the entries in the stock ledger referred to by Mr. Madden are made?

A. Yes, but they are not mine.

Q. They are not in yours?

A. No.

276 Q. Did you have anything to do with those entries?

A. Simply going over them at different times and seeing that they were correct in the general course of work.

Q. How do you do that?

A. Well, helping post the books, over-seeing.

Q. Do you know from the examination of the Car Book and the Auction Book, that these entries are correct?

A. I do.

Q. And are they?

A. They are.

Q. You don't know anything particularly about these shipments of horses, as far as the condition is concerned?

A. No.

(No cross examination)".

Mr. McBride: I now read the deposition of James L. Thompson, taken at the same time as the others, as follows:—

"JAMES L. THOMPSON, of lawful age, being by me first duly cautioned and sworn, and examined by Mr. Hellings for defendant, deposes and swore as follows:

Q. Do you live in Buffalo?

A. In Buffalo.

Q. And are employed by the Crandall Horse Co. as book-keeper?

A. As one of the book-keepers.

Q. And you were so on March and April, 1907?

A. I was.

Q. Who makes the entries in the stock ledger that is before you there?

A. I did.

Q. Those are in your own handwriting?

A. My own handwriting.

277 Q. Had your attention been called to those two shipments that were received on March 10th and March 23rd?

A. Never until now. That wasn't made in mine, and this here wasn't (indicates on book) that is just as a matter of form, and the boy put them in, but the figures that you want, practically, are mine.

Q. This is all in your handwriting?

A. That is all mine, yes, these here don't matter, it is just the putting them in, the boy helped me.

Q. How did you make all these entries?

A. From what? From a slip that the boys goes out and takes the horses and brings them in to me, and I put them into this book.

Q. Do you know whether the horses were sold in the condition and other particulars mentioned in the entries in the stock ledger?

A. I do.

Q. And are those entries correct?

A. Those entries are correct.

Q. And they are the only record you have?

A. They are the only record we have.

Q. Have you any record which shows, other than that, what the particular condition of each horse at this time of sale?

A. No, except the Auction Book.

Q. Do you know anything personally from examination as to the condition of those horses at the time they were sold?

A. I don't.

Q. Your knowledge is only based on these entries?

A. Based on the entries made.

(No cross examination)."

278 Judge Wolfe: We call Mr. Henry M. Stone for cross examination.

Also HENRY M. STONE, who, upon cross examination, by Judge Wolfe, testifies, as follows:—

Q. 1. Mr. Stone, did you ever make any writing in relation to your claim here prior to the time you filed your petition in this court?

A. I was at Buffalo and sold these horses——

2. No, just listen. Did you ever make any writing in reference to this claim you are suing on prior to the time that you filed your petition in this court?

Mr. Geer: We object to the question as indefinite and uncertain.

The Court: You understand the question?

A. About petition I don't understand that.

3. Before you began your case in this court in April, 1907?

A. I came right home from Buffalo and went to Mr. Barker——

4. I did not ask you that——

A. I am going——

Judge Wolfe: Read the question.

Question 2 read to witness, and question read also.

A. When was it filed? I don't know——

5. It was when you employed Mr. Barker. The Appearance Docket says April 13th, 1907.

A. I think I did.

6. Now, did you ever make any writing and present it to the office at Buffalo, in writing with reference to the damage to your horses and swear to it before a Notary or other officer and leave it with the agent at Buffalo, with reference to either of the two shipments of horses in March, 1907?

Objected to; ob. overruled; pl'ffs except.

A. No, sir.

7. Now, did you ever make such a writing and present it to the agent at Martel with reference to the shipment of horses of October, 1906?

278½ A. Mr. Noble did that business here.

8. Did you do it, I asked you.

A. No, sir.

Mr. Greer: I presume I will have no right to examine him, he being called for cross examination.

The Court: If you want him to explain anything he testified to, you can examine him.

Mr. McBride: You would have to do that in rebuttal.

The Court: My rule is where the adverse party is put on for cross

examination his own counsel may examine him to explain anything that the cross examination called out.

Mr. McBride: The Circuit Court at Lima reversed a case for that very reason.

The Court: Well, I think it is proper and but fair to the witness and fair play. He may examine him.

Mr. McBride: We take exceptions to the ruling of the court.

And upon redirect examination, by Mr. Geer, as follows:—

Q. 1. You were inquired of by Judge Wolfe——

Mr. McBride: We object to any question being asked by counsel for plaintiffs at this time because he was put upon the stand for cross examination.

Objection overruled; def't excepts.

Q. 1. —whether or not you had made any writing with reference to your claim. Now, I ask you whether or not you did anything at Buffalo to notify the company as to your claim or the condition of this shipment of horses?

Mr. McBride: We object because the contract says the notice must be in writing.

Objection sustained; pl'ffs except.

2. When did you finish your sale of the second load of horses at Buffalo?

279 A. I think they were part of them carried over until the next week.

The Court: This examination must be confined to what Judge Wolfe called out on cross examination and you can explain anything as to that now.

3. Who was the live stock agent or agent of the Erie Railroad Company at Buffalo?

Objected to; ob. sustained; pl'ffs except.

Mr. Geer: That is all I care to ask at the present time.

Mr. McBride: I desire to ask Mr. Noble a question or two on cross examination.

Also CLARK NOBLE, who, upon cross examination by Mr. McBride, testifies as follows:—

Q. 1. Mr. Noble, did you at any time make out a claim in writing and swear to it and present it to the agent of the Erie Railroad Company at Martel, or to the Erie agent at Buffalo, for the shipment to Martel or either of the shipments to Buffalo?

Objected to; ob. overruled; pl'ffs except.

A. No, sir, I did not. All I——

Mr. McBride: That answers the question and that is all.

Mr. Geer: I have no inquiry to make of this witness at this time.

Mr. McBride: We rest, your Honor.

And thereupon the defendant rested.
The Court: Proceed with your rebuttal.

Whereupon the plaintiffs, to further maintain the issue upon their part, gave and offered to the jury the following rebutting evidence, to-wit:

Plaintiffs' Rebuttal.

HENRY M. STONE, who, upon direct examination by Mr. Geer, testifies as follows:—

Q. 1. I would inquire of you as to whether or not at the time you made any of the three shipments of horses from St. Marys
280 you were informed by the agent, the freight agent at St. Marys, on the part of the company, or by anybody on the part of the railroad company, that there was more than one rate of shipment?

Objected to.
The Court: He may answer yes or no.
Objection overruled; deft. excepts.

A. No, sir.
2. I will ask you whether or not any of these papers—let me ask you which one of these is your name to.

Objected to as having been gone into chief.
Mr. Geer: I want to find out which one his name is to as I can not tell which one he signed. They are squirming a good deal and are not hurt.
Mr. McBride: I ask that that remark be taken down and that the court instruct the jury not to regard it.
The Court: The jurp will pay no attention to that remark of counsel as it is improper.

A. There it is.
3. I now hand you "Def't's Exhibit B," at the bottom of which your name appears, and which is headed "Limited liability live stock contract" and ask you whether or not that was exhibited to you at the time you signed it?

Objected.
Mr. McBride: And I especially object to it as to the last part of that contract, what it says there over his signature.
Objection fully argued; ob. overruled; deft. excepts.

A. No, sir, he just shoved it out of the window.
4. I will ask you, Mr. Stone, was any part of it exhibited to you and if so what part?

Objected to; ob. overruled; deft. excepts.

281 A. Well, there was one of it exhibited to me.
5. Now, you may state how you came to sign it, if you did sign it?

Objected to; ob. overruled; deft. excepts.

A. He shoved it out of the pigeon hole to me and says, "Sign this right here" and then he turned it over and says, "Sign it right there."

Motion to take answer from jury; motion overruled; deft. excepts.

Motion to take each and every part of the answer from the jury; motion overruled; deft. excepts.

6. I will ask you to state whether or not you examined or saw at any time its contents, or had any opportunity to examine and know what it was.

Objected to; ob. overruled; deft. excepts.

A. No, sir.

7. I will ask you, Mr. Stone, if you were informed by the agent at that time that you were then signing a paper entitled "Limited liability live stock contract"?

Objected to; ob. overruled; deft. excepts.

A. No, sir.

8. Did you have any knowledge you were signing such a contract?

Objected to; ob. overruled; deft. excepts.

A. No, sir.

9. Did you have any knowledge that there was any more than one rate?

Objected to; ob. overruled; deft. excepts.

A. I never knew there was any more than one rate.

Motion to take answer from jury and instruct the jury not to regard it; motion overruled; deft. excepts.

10. You were present at St. Marys, I believe, when the two shipments were made, were you?

A. Yes, sir, I was there in the morning, not just when they were shipped out.

282 11. Now, I will ask you whether or not you at any time concerning these three shipments authorized any person to sign a limited liability live stock contract for you or for and on behalf of Stone & Noble?

Objected to; ob. overruled; deft. excepts.

A. No, sir.

12. If any such contract was signed it is with or without your authority and consent?

Objected to.

The Court: I will sustain the objection to that because he says he did not authorize any one to do it for him or for Stone & Noble.

13. I will ask you whether anybody had authority to sign any

contract of limited liability live stock for you in shipping stock from St. Marys.

Objected to; ob. sustained; pl'ffs except.

14. Now, Mr. Stone, who is the live stock agent at Buffalo and who was at the time that you shipped these two shipments of horses on the 10th of March and 23rd of March, 1907?

A. Byron Stowys.

15. Did you see him after these shipments of horses arrived at Buffalo?

A. Yes, sir.

16. I will ask you, Mr. Stone, what, if anything, you did at Buffalo to inform the Erie Railroad as to the condition of these horses shipped.

Objected to as leading, incompetent and irrelevant; ob. overruled; deft. excepts.

A. I went to him and wanted him to go——

Objected to.

The Court: State what you said to him.

283 A. I said to him to go and look at these horses, Mr. Stowys, and he would not do it.

17. What else did you say to him about their condition?

Objected to; ob. overruled; deft. excepts.

A. I told him that I had a load of horses that had been out on the road a long time and they were badly bruised up.

Motion to take answer from jury on the ground it is not re-examination of anything and not proper as a matter of rebuttal; motion overruled; deft. excepts.

18. Mr. Stone, you may state to the court and jury why you went to Mr. Stowys with that complaint about that shipment of horses.

Objected to.

The Court: What do you claim for that?

Mr. Geer: He was the live stock agent of the Erie Railroad Company and the only man he could go to to make a complaint and to notify this company.

Mr. McBride: You have not proved anything of the kind.

The Court: You may prove what Stowys' business was. What he may have said he may have had some reasons himself that probably would not help us in this case.

19. Can you tell us what his business was?

A. He was live stock agent at Buffalo.

20. You know what his duties were as live stock agent, for what railroad?

A. For the Erie Railroad.

21. What were his duties?

Objected to; ob. overruled; deft. excepts.

A. His duties was to look after all this injured stock that come off of Erie trains and the way they were shipped in there.

22. Now, why did you go to him with your complaint about these injured horses?

284 Objected to; ob. sustained; pl'ffs except.

23. I will ask you, Mr. Stone, to state what other Erie official was there at East Buffalo to whom you could go and make complaint regarding live stock injured?

Objected to; ob. overruled; deft. excepts.

A. There is and was no other that I know of.

24. Did you go to Mr. Stowys about which shipment?

A. The last shipment of March 20th.

25. What did you do about the shipments of March 6th arriving March 10th?

A. I just took them and put them in a barn and told them——

26. I mean regarding Mr. Stowys, what did you do about them?

A. I did not notify him about them.

27. Now, Mr. Stone, how long did you remain in Buffalo after the 23rd?

A. I came home that night.

28. That was what day of March?

A. They were shipped on the 20th and we had the sale at Buffalo and I came hom- on Monday night.

29. Of what month?

A. March.

30. What year?

A. 1907.

31. Mr. Stone, did you do anything or have anything to do with any notice to the Erie Railroad Company as to those sixteen horses for Martel?

Objected to; ob. overruled; deft. excepts.

A. No, sir, I did not have anything.

No cross-examination.

285 Also CLARK NOBLE, who, upon direct examination by Mr. Geer, testifies as follows:

Q. 1. I will ask you whether you at any time authorized any person, or persons, to sign any limited liability live stock contract with The Lake Erie & Western Railroad Company or the Erie Railroad Company for the shipment of stock.

Objected to; ob. overruled; deft. excepts.

A. No, sir.

2. Now, then, I believe you were at St. Marys the day the sixteen horses were shipped to Martel?

A. Yes, sir.

3. And did you sign any contract?

A. No, sir, I think not.

4. I now hand you "Def't's Exhibit A" and ask you whether you signed your name on that exhibit in your handwriting?

A. No, sir.

5. Do you know Mr. J. T. Smith?

A. Yes, sir.

6. Now, did you at any time authorize him to sign any limited contract for a lower rate in the shipment of any horses?

Objected to; ob. overruled; deft. excepts.

A. No, sir.

7. I will ask you in the shipping of those horses what, if any, knowledge or information was given to you by the railroad company as to there being any more than one rate?

A. They never had but one rate.

Motion to take answer from jury; motion sustained.

8. I want to know what information, if any, was given to you by the agent at St. Marys as to there being more than one rate?

Objected to; ob. overruled; deft. excepts.

A. No Information.

286 9. What information or knowledge did you have in the shipment of horses to Martel, or any of the three shipments, from St. Marys that there was more than one rate, more than a single rate?

Objected to; ob. overruled; deft excepts.

A. I didn't know of any but one.

10. I will ask you, Mr. Noble, to state what, if any, request or demand you had made of the railroad company at St. Marys in the shipment of any one of these three shipments as to procuring a reduced rate or to ship under a limited liability live stock contract?

Objected to; ob. overruled; deft. excepts.

A. I never tried to get any different rate.

Question 10 read to witness.

A. I never made any request or demand.

11. Now, Mr. Noble, when did you first learn that the railroad company was claiming that you had shipped under a limited liability contract?

Objected to.

The Court: He said he didn't know of it when these shipments were made and it doesn't make any difference how soon afterwards he found out.

Mr. Geer: My purpose to show it was not known until long after this suit was brought.

The Court: That would not help it any. The objection is sustained.

12. What did you do towards notifying the Erie Railroad Com-

pany of the condition of this shipment of sixteen horses when they arrived at Martel?

A. I went up and talked to Mr. Sypher, the agent, about it and told him what shape they were in and told him I was going to sue the company.

13. When did you do that?

A. Right away.

287 14. Well, with reference to the date they arrived when was it?

A. The same morning they were en route.

Mr. McBride: I object to all this talk as the contract provided it should be in writing.

The Court: Is that all?

15. Did you do anything else?

A. I notified him what I was going to do, I would sue their company and he said "Go ahead and put in your claim. It is no- my fault the horses were injured.

16. I mean other than what you have stated did you do anything else?

A. I don't know how you mean.

17. Well, did you do anything else towards notifying them other than what you have already stated?

A. I had been up there several times during the day and night talking to the agent about it to see if they would come.

18. Did you do anything else besides what you have stated?

A. No, sir.

Mr. McBride: I move all that talk with the agent be taken from the jury and the jury be instructed not to regard it.

The Court: Is that all on that part of the examination?

Mr. Geer: That's all and we believe that is competent.

The Court: The theory upon which I have admitted this testimony was that probably dur-ng this talk something took place by which this requirement of the claim that the notice be presented in writing and sworn to. Now, this conversation does not amount to that or tend in that direction at all, but simply that he tells his agent he is going to sue the company and the agent says "Go ahead and put in your claim." That does not tend in the least to throw this man off his guard as to what he should do as he is required to do by these contracts here, to-wit, present a claim in writing within five days after the horses arrived in Martel, so I will sustain the

288 motion of the defendant and the jury will not regard or consider the answers of witness as to his talk with agent at Martel.

No cross-examination.

Mr. Geer: I presume for the purpose of the record that the date of the filing of the petition was April 13, 1907, and I want to now introduce that.

The Court: The Court takes judicial notice of that, yes, April 13, 1907.

Mr. Geer: And with that we have no further examination and rest.

And thereupon both sides rested.

Mr. McBride: We have a motion——

The Court: I will now excuse the jury until tomorrow morning at nine o'clock.

And thereupon the jury leave the courtroom.

Mr. McBride: We now renew our motion, as follows:

"And now comes the defendant, at the close of all the evidence in the case, and moves the court to arrest the evidence from the jury and to direct the jury to return a verdict for the defendant on the causes of action and this motion applies to each cause of action separately."

Thereupon said motion is argued to the court by the counsel.

The Court: I will take the matter under consideration.

And here court adjourns until tomorrow morning.

3rd Day, February 18, 1914, 9:00. Trial proceeded, as follows:

The Court: I will overrule the motion to direct a verdict.

Motion to arrest the evidence and direct a verdict overruled; deft. excepts.

And the foregoing, together with all the exhibits hereto attached, and made part hereof, was all the evidence given and offered to the jury upon the trial of said cause, and the same was duly considered by the jury.

JAMES T. CLOSE,
Official Court Stenographer of Crawford Co., Ohio.

289 Counsel agree that the court shall charge the jury before argument.

And thereupon the Court charged the jury, before argument of counsel to the jury, as follows:

Charge of Court.

"GENTLEMEN OF THE JURY: In the trial of jury cases the usual rule is that the charge of the court should be given after the arguments of counsel. In this case the counsel have asked me to charge the jury first, and they will argue the case afterwards.

This is an action to recover damages for injuries said to have been done to three shipments of horses in transportation over the defendants' railroads.

The plaintiffs, Henry M. Stone and Clark Noble, at the time in question were partners in the buying and selling of horses, and the defendants, The Lake Erie & Western and The Erie Railroad Companies, were common carriers of freight for hire. The Lake Erie and Western was dismissed in a former trial and the case is now prosecuted as against the Erie Railroad Company alone. When I speak of the defendant, or the defendant company, therefore, you will understand I refer to the Erie Railroad Company.

The first shipment complained of was made on the 10th day of October, 1906, from St. Marys, Ohio, to Martel, Ohio, and consisted of sixteen horses.

The second shipment was made on the 6th day of March, 1907, from St. Marys, Ohio, to Buffalo, New York, and consisted of twenty three horses.

The third shipment was made on the 20th day of March, 1907, from St. Marys, Ohio, to Buffalo, New York, and consisted of twenty two horses.

The shipment in each case was given to the said The Lake Erie & Western Railroad Company, and the arrangement for the
290 transportation was in writing and was made with that company acting for all connecting lines between St. Marys and Martel in the one case, and St. Marys and Buffalo in the other two, including the defendant, the Erie Railroad Company, by the terms of which the said defendant undertook to safely carry and deliver said horses at destination in good condition without unnecessary delay over that part of the route covered by its line.

As to said first shipment, the plaintiffs complain and say that the defendant company did not safely carry said horses over its line and deliver the same at Martel in good condition, but that when they arrived at their destination one of said horses was found to be severely maimed and jammed in the right foreleg and injured in his stifle joint; one chestnut sorrel horse was injured in its stifle joint and right leg; one black horse was crippled in its foreleg; one bay horse was injured so as to become lame, and that all said sixteen horses were more or less scarred and bruised and rough; and that all the said injuries to said horses were sustained in their transportation over the line of said company and by its negligence in doing so, to the damage of the plaintiffs in the sum of $315.00.

As to the second, the shipment of March 6, 1907, the plaintiffs complain and say that the defendant company did not safely carry said horses over its line and deliver the same at Buffalo in good condition, but that when they arrived at their destination it was found that seven of said horses were lame, bruised and scarred and that the entire load was in a very gaunt, rough, bad and unsalable condition; that all said injuries to said horses were sustained in their transportation over the line of the defendant company, and by its negligence in doing so, to the damage of the plaintiffs in the sum of $350.00.

291 As to the third, the shipment of March 20th, 1907, the plaintiffs complain and say that the defendant company did not safely carry said horses over its line and deliver the same at Buffalo in good condition, but that when they arrived at their destination it was found that one of said horses had become sick and died, that two were so badly injured that they were sold on the account of said company, and that all said horses were more or less scarred, bruised, rough and in an unsalable condition; that all said injuries to said horses were sustained in their transportation over the line of the defendant company, and by its negligence in doing so, to the damage of the plaintiffs in the sum of $750.00.

The plaintiffs therefore claim that there is due them from the said company by way of damages herein the sum of $1415.00, with interest on $315.00 thereof from October 13th, 1906; with interest on $300.00 thereof from the 17th day of March, 1907, and with interest*ed* on $750.00 thereof from March 23rd, 1907, and for this amount they ask a verdict at your hands.

In answer to this claim so made by the plaintiffs, the defendant company denies that said horses were injured in the transportation of the same over its road, and the extent of their injuries at any time, and the amount of the damages which the plaintiffs claim. They also plead the provisions of the contract, under which these horses were shipped in each case, by which they agreed in consideration of the lower rate of freight charged that the value of the horses did not exceed $100.00 each, and that they are thereby limited in the amount of any damages that they might be entitled to recover to the said sum of $100.00 on any horse so injured or killed.

The said company also pleads another provision of said contract which required the plaintiffs to file with the agent at the
292 place of destination within five days after the arrival of the horses there in each case a written claim sworn to for the amount of their damage or loss occurring in such shipment.

The plaintiffs claim that they signed the contracts in question not knowing or being advised what they contained and without any opportunity of reading the same. They do not claim in their pleadings, or in their evidence, that they were mislead or forced to sign them or that any misrepresentations, deceit or fraud was perpetrated upon them to procure their signatures. They had long been in the business of shipping horses, they signed the contracts voluntarily, they procured the lower rate because they had signed them, and if they signed them in a hurry or not caring what they contained, they assumed the risk of their own folly and can not be heard now to take advantage of it. I hold, therefore, that they are bound by the provisions of these contracts.

It is conceded in the evidence that no written claim, sworn to or otherwise, was filed with the agent of the defendant company at Martel or Buffalo within the five days after the arrival of the horses at these places, respectively, which, I say to you is a defense in this action, unless from all the facts and circumstances presented as to each shipment the same could not reasonably be done within that time. I mean by this, if, after the arrival of the horses at their destination in any case and the extent of the injuries to or loss of any horse, or horses, was discovered, and there remained a reasonable time within the five days to make up and present to the agent at the station of destination of such shipment a written claim, sworn to, of their damages by reason of such injury and loss, they were bound to do so in order to protect their claim. To put it another way: if the extent of the injuries to the horses, or the loss of any horse, could not reasonably be discovered within the
293 five days, or if the same was discovered within the five days and the time remaining was so short that by reasonable effort

the plaintiffs could not make up their claim, have it sworn to and present it to the agent of the defendant company at the place of destination in any case, then that would be unreasonable and would excuse them from the filing of such claim. The question presented to you, therefore, as to each shipment is: was this five day limit reasonable or unreasonable as applied to the facts and circumstances as to that shipment?

If, as to any shipment in question here, you conclude that this five days limit was reasonable under the facts and circumstances of that shipment as developed by the evidence adduced here, then it will be your duty to find for the defendant company as to the claim for damages made on account of such shipment.

If you should conclude that this five day limit was reasonable, as explained, as to each and every one of said shipments, then, of course, it will be your duty to return a verdict for the defendant company on all three causes of action.

But, if as to any shipment in question here, you conclude that this five day limit was unreasonable, under the facts and circumstances of that shipment as developed by the evidence adduced here, then it will be your duty to find for the plaintiffs on their claim for damages made on account of any such shipment, or shipments. This, if you find from the evidence that any of the horses were injured while on the defendant company's line, not due to the actions of the horses themselves in kicking, biting or crowding one upon another. Such injuries as the latter the defendant company is not liable for.

In case you find for the plaintiffs, the measure of damages is the difference in the reasonable market value of the horses as of
294 the time when they arrived at their destination of Martel and Buffalo, respectively, and that which they reasonably would have had at that time and place had they arrived in good condition, subject only to the wear, fatigue, hunger and thirst occasioned in the ordinary course of transportation, not exceeding, as I have already explained to you, $100.00 for any one horse.

The burden of proof in this case, gentlemen, is upon the plaintiffs, and it is for them to show by a preponderance of the evidence that said horses were injured on the defendant company's line, that their injuries were such as would not be attributed to their transportation in the usual and ordinary way, the amount of their damages on account thereof, and that the five day limit in each shipment was unreasonable under the facts and circumstances of that particular case. That is to say, if they fail to show by a preponderance of the evidence each and every one of these facts as to any one of these shipments, they must fail in their claim for damages as to such shipment or shipments.

This term preponderance of evidence I have used means that evidence which has the greater weight—weighing more than the other evidence. It means the evidence which you believe in preference to other evidence. It does not necessarily consist of the greater number of witnesses, but it may. In weighing their testimony, how-

ever, you will note their appearance, manner and demeanor while testifying, their respective opportunities of seeing, knowing and remembering what they testified to. Consider the probability of its truth; their relation to the parties in the case, if any, and any other fact or thing which you may know or have observed of the witnesses, or any of them, which may tend to credit or discredit what they have said. He is said to have the preponderance of evidence on
295 his side who has given you better reason to believe what he claims is true.

I will instruct you after argument as to the forms of verdict."

To which charge of the court defendant excepts as a whole and to each and every part thereof.

Whereupon counsel argue the case to the jury.

The Court: Gentlemen of the jury, I now submit the case to you. When you retire to your room you will select one of your number to act as your foreman and he will sign the verdict upon which you may agree. I have prepared two blank verdicts for your use; number one is the verdict for the plaintiffs, number two is the verdict for the defendant, the Erie Railroad Company. You will use the blank appropriate to the finding which you make. In case you find for the plaintiffs, you will find in blank number one a space in which you should enter the amount the plaintiffs shall recover. The other verdict is complete in itself. You may begin your investigations."

At the close of the trial the defendant asked that each one of the several exhibits offered and introduced in evidence by it be sent to the jury room, asking each one to go separately, which the court refused to send each one of the separate exhibits to the jury; to which refusal the defendant at the time excepted.

Whereupon the jury retired, and after deliberation return- into court their verdict in favor of the plaintiffs and against the defendant, as appears of record.

Thereupon the defendant, within three days, filed its motion for a new trial, which, upon consideration, the court overruled, and judgment was duly rendered upon the verdict; to which
296 ruling and judgment the defendant then and there excepted; and upon motion, and consent, the defendant is allowed by the court the statutory time, in which to prepare its bill of exceptions and have the same filed herein, allowed, sealed and made a part of the record herein; and it was ordered by the court that the journal of court be kept open such time for that purpose.

And now the defendant tenders this, its bill of exceptions herein, which contains all the evidence given and offered upon the trial of said cause, and asks that the same be allowed, signed, sealed and

made a part of the record of this cause, which is done accordingly within said statutory time aforesaid.

WILLIAM F. DUNCAN, [SEAL.]
Acting Common Pleas Judge of the 2nd Subdivision of the 10th Judicial District of Ohio.

Bucyrus, Ohio, April 21", 1914.

Filed Jun- 10, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

(Here follow photographs marked pp. 297, 298 and 299.)

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S. 8068. 4-06. 10m. (GBS 75301

FORM 17.

LIMITED LIABILITY LIVE STOCK CONTRACT

—FOR—

THE LAKE ERIE & WESTERN RAILROAD COMPANY,
FT. WAYNE, CINCINNATI & LOUISVILLE R. R.
—AND—
NORTHERN OHIO RAILWAY COMPANY.

No. ____ Station, Toledy 10 Oct 190 6

THIS AGREEMENT, made this ____ day of ____ 190 6

by and between the {LAKE ERIE & WESTERN RAILROAD COMPANY, FT. WAYNE, CINCINNATI & LOUISVILLE R. R. NORTHERN OHIO RAILWAY COMPANY.} hereinafter called the Carrier, and Dora Smith hereinafter called the Shipper,

WITNESSETH, That the said Shipper has delivered to the said Carrier Live Stock of the kind and number, and consigned and destined by said Shipper, as follows:

CONSIGNEE, DESTINATION, ETC.	NUMBER AND DESCRIPTION OF STOCK. (SHIPPERS' LOAD AND COUNT.)	WEIGHT. SUBJECT TO CORRECTION.
Clark Noble Martel Ohio	16 Horses	20000
Advance Charges, $	Via Erie Ry.	
Car Nos. and Initials	1971 Erie	

FILED
JUN 10 1915
SUPREME COURT OF OHIO
FRANK McKEAN Clerk

for transportation from Edwards to ____ to destination, if on the said carrier's line of railroad, otherwise to the place where said Live Stock is to be received by the connecting carriers for transportation to or toward destination, and that the same has been received by said carrier for itself and on behalf of connecting carriers, for transportation, subject to the official tariffs, classifications and rules of the said company, and UPON THE FOLLOWING TERMS AND CONDITIONS, WHICH ARE ADMITTED AND ACCEPTED BY THE SAID SHIPPER AS JUST AND REASONABLE, viz:

That said shipper, or the consignee, is to pay freight thereon to the said carrier at the rate of 23¢ per 100 from Edwards to Martel O which is the lower published tariff rate based upon the express condition that the carrier assumes liability on the said Live Stock to the extent only of the following AGREED VALUATION, UPON WHICH VALUATION IS BASED THE RATE CHARGED FOR THE TRANSPORTATION OF THE SAID ANIMALS, and beyond which valuation neither the said carrier nor any connecting carrier shall be liable in any event, whether the loss or damage occur through the negligence of the said carrier or connecting carriers or their employees or otherwise:

If Horses or Mules—not exceeding one hundred dollars each.
If Cattle or Cows—not exceeding seventy-five dollars each.
If Fat Hogs or Fat Calves—not exceeding fifteen dollars each.
If Sheep, Lambs, Stock Hogs, Stock Calves, or other small animals, not exceeding five dollars each.
And in no event shall the carriers' liability exceed one thousand two hundred dollars upon any carload.

That said shipper is to pay all back charges and freight paid by said carrier or connecting carrier upon or for the transportation of said Live Stock.

That the said shipper is, at his own sole risk and expense, to load and take care of, and to feed and water said stock whilst being transported, whether delayed in transit or otherwise, and to unload the same; and neither said carrier nor any connecting carrier is to be under any liability or duty with reference thereto, except in the actual transportation of the same.

That the said shipper is to inspect the body of the car or cars in which said stock is to be transported, and satisfy himself that they are sufficient and safe, and in proper order and condition, and said carrier or any connecting carrier shall not be liable on account of any loss of or injury to said stock happening by reason of any alleged insufficiency in or defective condition of the body of said car or cars.

That said shipper shall see that all doors and openings in said car or cars are at all times so closed and fastened as to prevent the escape therefrom of any of the said stock, and said carrier or any connecting carrier shall not be liable on account of the escape of any of the said stock from said car or cars.

The said carrier or any connecting carrier shall not be liable for or on account of any injury sustained by said live stock occasioned by any or either of the following causes, to-wit: Overloading, crowding one upon another, kicking or goring, suffocating, fright, burning of hay or straw or other material used for feeding or bedding, or by fire from any cause whatever, or by heat, cold, or changes in weather, or for delay caused by stress of weather, by obstruction of track, by riots, strikes or stoppage of labor, or from causes beyond their control. No carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route; nor after said property is ready for delivery to the next carrier or to consignee.

That in the event of any unusual delay or detention of said live stock, caused by the negligence of the said carrier, or its employes, or its connecting carriers or their employes, or otherwise, the said shipper agrees to accept as full compensation for all loss or damage sustained thereby the amount actually expended by said shipper, in the purchase of food and water for the said

of labor, or from causes beyond said carrier's control. No carrier shall be liable for loss or damage not occurring on the own lines of its portion of the through route; nor after said property is ready for delivery to the next carrier or to consignee.

That in the event of any unusual delay or detention of said live stock, caused by the negligence of the said carrier, or its employes, or its connecting carriers or their employes, or otherwise, the said shipper agrees to accept as full compensation for all loss or damage sustained thereby the amount actually expended by said shipper, in the purchase of food and water for the said stock, while so detained. That no claim for damages which may accrue to the said shipper under this contract shall be allowed or paid by the said carrier, or sued for in any court by the said shipper, unless a claim for such loss or damage shall be made in writing, verified by the affidavit of the said shipper or his agent, and delivered to the agent of said carrier at his office in within five days from the time said stock is removed from said car or cars; and that if any loss or damage occurs upon the line of a connecting carrier, then such carrier shall not be liable unless a claim shall be made in like manner, and delivered in like time, to some proper officer or agent of the carrier on whose line the loss or injury occurs.

That whenever the person or persons accompanying said stock under this contract, to take care of the same, shall leave the caboose and pass over or along the cars or track of said carrier, or of connecting carriers, they shall do so at their own sole risk of personal injury, from whatever cause, and neither the said carrier nor its connecting carriers, shall be required to stop or start their trains or caboose cars at or from the depots or platforms, or to furnish lights for the accommodation or safety of the persons accompanying said stock to take care of the same under this contract.

And it is further agreed by said shipper, that, in consideration of the premises and of the carriage of a person or persons in charge of said stock upon a freight train of said carrier or its connecting carriers without charge other than the sum paid or to be paid for the transportation of the Live Stock in his or their charge, that the said shipper shall and will indemnify and save harmless said carrier, and every connecting carrier, from all claims, liabilities and demands of every kind, nature and description, by reason of personal injury sustained by said person or persons so in charge of said stock, whether the same be caused by the negligence of said carrier or any connecting carrier, or any of its or their employes, or otherwise.

And do hereby acknowledge that had the option of shipping the above described Live Stock at a higher rate of freight according to the official tariffs, classifications and rules of the said carrier and connecting carriers and thereby receiving the security of the liability of the said carrier and connecting railroad and transportation companies as common carriers of the said Live Stock upon their respective roads and lines, but ha voluntarily decided to ship the same under this contract at the reduced rate of freight above first mentioned.

Defts Exhibit "A" 301

THE LAKE ERIE & WESTERN RAILROAD COMPANY,
FT. WAYNE, CINCINNATI & LOUISVILLE R. R.
and NORTHERN OHIO RAILWAY COMPANY.

Witness my hand

By Station Agent.

Shipper.

By Shipper's Agent.

Witness

(The Release for [illegible] is printed on the reverse of this [illegible]

6700. 4-05. 10m. (GES 70647)

FORM 17.

LIMITED LIABILITY LIVE STOCK CONTRACT

—FOR—

THE LAKE ERIE & WESTERN RAILROAD COMPANY,
FT. WAYNE, CINCINNATI & LOUISVILLE R. R.

—AND—

NORTHERN OHIO RAILWAY COMPANY.

No. ..... Chicago Station, March 6 1907

THIS AGREEMENT, made this 6th day of March 1907

by and between the LAKE ERIE & WESTERN RAILROAD COMPANY, FT. WAYNE, CINCINNATI & LOUISVILLE R. R. NORTHERN OHIO RAILWAY COMPANY. hereinafter called the Carrier, and

Stone Kahle & Smith hereinafter called the Shipper,

WITNESSETH, That the said Shipper has delivered to the said Carrier Live Stock of the kind and number, and consigned and destined by said Shipper, as follows:

CONSIGNEE, DESTINATION, ETC.	NUMBER AND DESCRIPTION OF STOCK. (SHIPPER'S LOAD AND COUNT.)	WEIGHT. SUBJECT TO CORRECTION.
Crandall Home Co		
East Buffalo Ny	11 Horses	20000
via Erie Ry		Rebate Order
Advance Charges, $	Stop at Delaware & Finch	
Car Nos. and Initials	67967	

for transportation from Chicago to destination, if on the said carrier's line of railroad, otherwise to the place where said Live Stock is to be received by the connecting carriers for transportation to or toward destination, and that the same has been received by said carrier for itself and on behalf of connecting carriers for transportation, subject to the official tariffs, classifications and rules of the said company, and UPON THE FOLLOWING TERMS AND CONDITIONS, WHICH ARE ADMITTED AND ACCEPTED BY THE SAID SHIPPER AS JUST AND REASONABLE, viz: 31

That said shipper, or the consignee, is to pay freight thereon to the said carrier at the [illegible] per 100 lbs from Chicago to East Buffalo Ny which is the lower, published tariff rate based upon the express condition that the carrier assumes liability on the said Live Stock to the extent only of the following AGREED VALUATION, UPON WHICH VALUATION IS BASED THE RATE CHARGED FOR THE TRANSPORTATION OF THE SAID ANIMALS, and beyond which valuation neither the said carrier nor any connecting carrier shall be liable in any event, whether the loss or damage occur through the negligence of the said carrier or connecting carriers or their employees or otherwise:

If Horses or Mules—not exceeding one hundred dollars each.
If Cattle or Cows—not exceeding seventy-five dollars each.
If Fat Hogs or Fat Calves—not exceeding fifteen dollars each.
If Sheep, Lambs, Stock Hogs, Stock Calves, or other small animals,—not exceeding five dollars each.
And in no event shall the carriers' liability exceed one thousand two hundred dollars upon any carload.

That said shipper is to pay all back charges and freight paid by said carrier or connecting carrier upon or for the transportation of said Live Stock.

That the said shipper is, at his own sole risk and expense, to load and take care of, and to feed and water said stock whilst being transported, whether delayed in transit or otherwise, and to unload the same; and neither said carrier nor any connecting carrier, is to be under any liability or duty with reference thereto, except in the actual transportation of the same.

That the said shipper is to inspect the body of the car or cars in which said stock is to be transported, and satisfy himself that they are sufficient and safe, and in proper order and condition, and said carrier or any connecting carrier shall not be liable, on account of any loss of or injury to said stock happening by reason of any alleged insufficiency in or defective condition of the body of said car or cars.

That said shipper shall see that all doors and openings in said car or cars are at all times so closed and fastened as to prevent the escape therefrom of any of the said stock, and said carrier or any connecting carrier shall not be liable on account of the escape of any of the said stock from said car or cars.

The said carrier or any connecting carrier shall not be liable for or on account of any injury sustained by said live stock occasioned by any or either of the following causes, to-wit: Overloading, crowding one upon another, kicking or goring, suffocating, fright, burning of hay or straw or other material used for feeding or bedding, or by fire from any cause whatever, or by heat, cold, or changes in weather, or for delay caused by stress of weather, by obstruction of track, by riots, strikes or stoppage of labor, or from causes beyond their control. No carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route; nor after said property is ready for delivery to the next carrier or to consignee.

That in the event of any unusual delay or detention of said [illegible]

Sept 12

heat, cold, or changes in weather, or for delay caused by stress of weather, by obstruction of track, by riots, strikes or stoppage of labor, or from causes beyond their control. No carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route; nor after said property is ready for delivery to the next carrier or to consignee.

That in the event of any unusual delay or detention of said live stock, caused by the negligence of the said carrier, or its employes, or its connecting carriers or their employes, or otherwise, the said shipper agrees to accept as full compensation for all loss or damage sustained thereby the amount actually expended by said shipper, in the purchase of food and water for the said stock, while so detained. That no claim for damages which may accrue to the said shipper under this contract shall be allowed or paid by the said carrier, or sued for in any court by the said shipper, unless a claim for such loss or damage shall be made in writing, verified by the affidavit of the said shipper or his agent, and delivered to the Agt. agent of said carrier at his office in East Buffalo N.Y. within five days from the time said stock is removed from said car or cars; and that if any loss or damage occurs upon the line of a connecting carrier, then such carrier shall not be liable unless a claim shall be made in like manner, and delivered in like time, to some proper officer or agent of the carrier on whose line the loss or injury occurs.

That whenever the person or persons accompanying said stock under this contract, to take care of the same, shall leave the caboose and pass over or along the cars or track of said carrier, or of connecting carriers, they shall do so at their own sole risk of personal injury, from whatever cause, and neither the said carrier nor its connecting carriers, shall be required to stop or start their trains or caboose cars at or from the depots or platforms, or to furnish lights for the accommodation or safety of the persons accompanying said stock to take care of the same under this contract.

And it is further agreed by said shipper, that, in consideration of the premises and of the carriage of a person or persons in charge of said stock upon a freight train of said carrier or its connecting carriers without charge other than the sum paid or to be paid for the transportation of the Live Stock in his or their charge, that the said shipper shall and will indemnify and save harmless said carrier, and every connecting carrier, from all claims, liabilities and demands of every kind, nature and description, by reason of personal injury sustained by said person or persons so in charge of said stock, whether the same be caused by the negligence of said carrier or any connecting carrier, or any of its or their employes, or otherwise.

And Chas Wm Smith do hereby acknowledge that They had the option of shipping the above described Live Stock at a higher rate of freight according to the official tariffs, classifications and rules of the said carrier and connecting carriers and thereby receiving the security of the liability of the said carrier and connecting railroad and transportation companies as common carriers of the said Live Stock upon their respective roads and lines, but have voluntarily decided to ship the same under this contract at the reduced rate of freight above first mentioned.

Defts Ex. B"

THE LAKE ERIE & WESTERN RAILROAD COMPANY,
FT. WAYNE, CINCINNATI & LOUISVILLE R. R.
and NORTHERN OHIO RAILWAY COMPANY.

Witness my hand 20 [illegible] Station Agent.

Chas Wm Smith Shipper.

Witness.

By [illegible] Shipper's Agent.

[The Release for Man in charge is printed on the reverse of this sheet.]

F 200. 4-05. 10m. (GBS 70847)

FORM 17.

LIMITED LIABILITY LIVE STOCK CONTRACT

—FOR—

THE LAKE ERIE & WESTERN RAILROAD COMPANY,
FT. WAYNE, CINCINNATI & LOUISVILLE R. R.

—AND—

NORTHERN OHIO RAILWAY COMPANY.

No. ..... Elmore Station, Oct 20 1907

THIS AGREEMENT, made this 20th day of March 1907

by and between the { LAKE ERIE & WESTERN RAILROAD COMPANY, FT. WAYNE, CINCINNATI & LOUISVILLE R. R. NORTHERN OHIO RAILWAY COMPANY } hereinafter called the Carrier, and

Stone-Rodd Smith hereinafter called the Shipper,

WITNESSETH, That the said Shipper has delivered to the said Carrier Live Stock of the kind and number, and consigned and destined by said Shipper, as follows:

CONSIGNEE, DESTINATION, ETC.	NUMBER AND DESCRIPTION OF STOCK. (SHIPPERS' LOAD AND COUNT.)	WEIGHT. SUBJECT TO CORRECTION.
The Crandall Horse Co		
East Buffalo N.Y.	11 Horses	20000
Advance Charges, $	Via Erie Ry	
Car Nos. and Initials	69944 Erie	

for transportation from Elmore to destination, if on the said carrier's line of railroad, otherwise to the place where said Live Stock is to be received by the connecting carriers for transportation to or toward destination, and that the same has been received by said carrier for itself and on behalf of connecting carriers, for transportation, subject to the official tariffs, classifications and rules of the said company, and UPON THE FOLLOWING TERMS AND CONDITIONS, WHICH ARE ADMITTED AND ACCEPTED BY THE SAID SHIPPER AS JUST AND REASONABLE, viz:

That said shipper, or the consignee, is to pay freight thereon to the said carrier at the rate of 81½ per 100 from Elmore to Buffalo N.Y. which is the lower published tariff rate based upon the express condition that the carrier assumes liability on the said Live Stock to the extent only of the following AGREED VALUATION, UPON WHICH VALUATION IS BASED THE RATE CHARGED FOR THE TRANSPORTATION OF THE SAID ANIMALS, and beyond which valuation neither the said carrier nor any connecting carrier shall be liable in any event, whether the loss or damage occur through the negligence of the said carrier or connecting carriers or their employees or otherwise:

If Horses or Mules—not exceeding one hundred dollars each.
If Cattle or Cows—not exceeding seventy-five dollars each.
If Fat Hogs or Fat Calves—not exceeding fifteen dollars each.
If Sheep, Lambs, Stock Hogs, Stock Calves, or other small animals,—not exceeding five dollars each.
And in no event shall the carriers' liability exceed one thousand two hundred dollars upon any carload.

That said shipper is to pay all back charges and freight paid by said carrier or connecting carrier upon or for the transportation of said Live Stock.

That the said shipper is at his own sole risk and expense, to load and take care of, and to feed and water said stock whilst being transported, whether delayed in transit or otherwise, and to unload the same; and neither said carrier nor any connecting carrier, is to be under any liability or duty with reference thereto, except in the actual transportation of the same.

That the said shipper is to inspect the body of the car or cars in which said stock is to be transported, and satisfy himself that they are sufficient and safe, and in proper order and condition, and said carrier or any connecting carrier shall not be liable, on account of any loss of or injury to said stock happening by reason of any alleged insufficiency or defective condition of the body of said car or cars.

That said shipper shall see that all doors and openings in said car or cars are at all times so closed and fastened as to prevent the escape therefrom of any of the said stock, and said carrier or any connecting carrier shall not be liable on account of the escape of any of the said stock from said car or cars.

The said carrier or any connecting carrier shall not be liable for or on account of any injury sustained by said live stock occasioned by any or either of the following causes, to-wit: Overloading, crowding one upon another, kicking or goring, suffocating, fright, burning of hay or straw or other material used for feeding or bedding, or by fire from any cause whatever, or by heat, cold or changes in weather or for delay caused by stress of weather, by obstruction of track, by riots, strikes or stoppage of labor, or from causes beyond their control. No carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route; nor after said property is ready for delivery to the next carrier or to consignee.

That in the event of any unusual delay or detention of said live stock, caused by the negligence of the said carrier, or its employes, or the connecting carriers or their employes, or otherwise, the said shipper agrees to accept as full compensation for all loss or damage sustained thereby the amount actually expended by said shipper, in the purchase of food and water for the said stock, while so detained. That no claim for damages which may accrue to the said shipper under this contract shall be allowed or paid by the said carrier, or sued for [illegible] by the said shipper, unless a claim for such loss or damage shall be made in

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303

of any of the said stock from said car or cars.

The said carrier or any connecting carrier shall not be liable for or on account of any injury sustained by said live stock occasioned by any or either of the following causes, to-wit: Overloading, crowding one upon another, kicking or goring, suffocating, fright, burning of hay or straw or other material used for feeding or bedding, or by fire from any cause whatever, or by heat, cold or changes in weather, or for delay caused by stress of weather, by obstruction of track, by riots, strikes or stoppage of labor, or from causes beyond their control. No carrier shall be liable for loss or damage not occurring on his road or its portion of the through route; nor after said property is ready for delivery to the next carrier or to consignee.

That in the event of any unusual delay or detention of said live stock, caused by the negligence of the said carrier, or its employes, or connecting carriers or their employes, or otherwise, the said shipper agrees to accept as full compensation for all loss or damage sustained thereby the amount actually expended by said shipper, in the purchase of food and water for the said stock, while so detained. That no claim for damages which may accrue to the said shipper under this contract shall be allowed or paid by the said carrier, or sued for in any court, by the said shipper, unless a claim for such loss or damage shall be made in writing, verified by the affidavit of the said shipper or his agent, and delivered to the ..... agent of said carrier at his office in ..... within five days from the time said stock is removed from said car or cars; and that if any loss or damage occurs upon the line of a connecting carrier, then such carrier shall not be liable unless a claim shall be made in like manner, and delivered in like time, to some proper officer or agent of the carrier on whose line the loss or injury occurs.

That whenever the person or persons accompanying said stock under this contract, to take care of the same, shall leave the caboose and pass over or along the cars or track of said carrier, or of connecting carriers, they shall do so at their own sole risk of personal injury, from whatever cause, and neither the said carrier nor its connecting carriers, shall be required to stop or start their trains or caboose cars at or from the depots or platforms, or to furnish lights for the accommodation or safety of the persons accompanying said stock to take care of the same under this contract.

And it is further agreed by said shipper, that, in consideration of the premises and of the carriage of a person or persons in charge of said stock upon a freight train of said carrier or its connecting carriers without charge other than the sum paid or to be paid for the transportation of the Live Stock in his or their charge, that the said shipper shall and will indemnify and save harmless said carrier, and every connecting carrier, from all claims, liabilities and demands of every kind, nature and description, by reason of personal injury sustained by said person or persons so in charge of said stock, whether the same be caused by the negligence of said carrier or any connecting carrier, or any of its or their employes, or otherwise.

And ..... do hereby acknowledge that ..... the option of shipping the above described Live Stock at a higher rate of freight according to the official tariffs, classifications and rules of the said carrier and connecting carriers and thereby receiving the security of the liability of the said carrier and connecting railroad and transportation companies as common carriers of the said Live Stock upon their respective roads and lines, but ..... voluntarily decided to ship the same under this contract at the reduced rate of freight above first mentioned.

THE LAKE ERIE & WESTERN RAILROAD COMPANY,
FT. WAYNE, CINCINNATI & LOUISVILLE R. R
and NORTHERN OHIO RAILWAY COMPANY.

Witness my hand ..... 190 ..... By ..... Station Agent.

Shipper.

By ..... Shipper's Agent.

Witness

(Not Release for Man in charge as per ..... as covered ..... rate)

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TARIFFS

OF THIS COMPANY ARE

ON FILE IN OFFICE

AND ARE

OPEN TO INSPECTION.

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300 THE LAKE ERIE & WESTERN R. R. Co. and THE ERIE R. R. Co.
vs.
STONE and NOBLE.

The plaintiffs states in the portion of the Bill of Exceptions presented, the following on page 20 in answer to question 145 in the testimony of H. M. Stone, the word "stallions" in the first line of said answer should be "chunks", and the word "draft" in the third line of said answer should be "drivers", and the answer should read as follows: "Why they were draft horses, a few chunks about 1400 lbs., general purposes horses, wagon horses and one or two drivers in the load, and some big horses."

On page 23 in answer to question 171, the word "to" in the first line between the word "down" and "the" should be "in", and the answer as corrected should read as follows: "Had been bruised on the leg down in the car, I suppose, and tramped on."

W. J. GEER,
Att'y for Plaintiffs.

Bucyrus, Ohio, April 18, 1914.

Above corrections made by agreement and so entered by interlineation.

FRANK PIGMAN,
Att'y for Defendant.
W. J. GEER,
Att'y for Plaintiffs.

Filed Jun- 10, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

(Here follow way-bills marked pages 301 to 306.)

307 On File With Interstate Commerce Commission.

"Joint Freight Tariff No. 1663.

Giving Exceptions to the Official Classifications.

From Page 7 thereof, as follows: "Item No. 52. Live stock, in carloads, subject to the Rules, Conditions and Special Instructions of the Official Classification, and to terms and conditions specified in the usual Live Stock Transportation Contract: Horses and Mules, C. L. Current Second Class Rates."
Defendants' Exhibit G."

Filed June 10, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

308 "Lake Erie & Western Railroad Company.

Naming Commodity Rates.

From Group No. 13, St. Mary's Ohio to Buffalo, N. Y. 31½¢ per 100 pounds, rate basis."
"Defendants' Exhibit H."
Filed June 10, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

309 "Lake Erie & Western Railroad Company.

Joint Freight Tariff.

From All Stations to Points Shown Herein on the Erie Railroad, Taking Effect August 31st, 1896.

To Martel, Ohio, from St. Marys, Ohio, 23¢ per 100 pounds, classes."
"Defendants' Exhibit J."

Filed June 10, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

310 "Lake Erie & Western Railroad Company.

Official Classification.

On File With Interstate Commerce Commission.

No. 28.

To Take Effect July 1, 1906.

Superseding Official Classification No. 27.

From Page 1: 'Property carried not subject to the conditions of the Uniform Bill of Lading will be at the Carrier's Liability, limited

only as provided by Common Law and by the Laws of the United States and by the several States, in so far as they apply. Property thus carried will be charged twenty (20) per cent higher (subject to a minimum increase of one (1) cent per one hundred pounds), than if shipped subject to the conditions of the uniform Bill of Lading, and the cost of marine insurance will be added over any part of the route that may be by water."

"Defendants' Exhibit K."

Filed June 10, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

311 "Lake Erie & Western Railroad Company.

Official Classification.

On File With Interstate Commerce Commission.

No. 29.

To Take Effect January 1, 1907.

From page 1: 'Property carried not subject to the conditions of the Uniform Bill of Lading will be at the Carrier's Liability, limited only as provided by Common Law and by the Laws of the United States and by the several States, in so far as they apply. Property thus carried will be charged twenty (20) per cent. higher (subject to a minimum increase of one (1) cent oer one hundred pounds), than if shipped subject to the conditions of the Uniform Bill of Lading, and the cost of marine insurance will be added over any part of the route that may be by water."

Defendants' Exhibit L."

Filed June 10, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

[Endorsed.] 14913. Filed Jun- 10, 1915. Supreme Court of Ohio. Frank E. McKean, Clerk.

Endorsed on cover: File No. 24,933. Ohio, Crawford County, Court of Appeals. Term No. 254. Erie Railroad Company, plaintiff in error, vs. Henry M. Stone and Clark Noble, partners doing business under the name of Stone & Noble. Filed October 1st, 1915. File No. 24,933.

(24,933)

Office Supreme Court, U. S.
FILED
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JAMES D. MAHER
CLERK

In the Supreme Court of the United States

October Term, 1916.

No. 254.

ERIE RAILROAD COMPANY,
Plaintiff in Error,

vs.

HENRY M. STONE AND CLARK NOBLE, PARTNERS, DOING BUSINESS UNDER THE NAME OF STONE & NOBLE,
Defendants in Error.

ERROR TO THE COURT OF APPEALS OF CRAWFORD COUNTY, STATE OF OHIO.

BRIEF FOR ERIE RAILROAD COMPANY, PLAINTIFF IN ERROR.

C. E. McBRIDE,
N. M. WOLFE,
WILLIAM E. CUSHING,
Attorneys for Erie Railroad Company, Plaintiff in Error.

(24,933)

In the Supreme Court of the United States

October Term, 1916.

No. 254.

ERIE RAILROAD COMPANY,
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vs.

HENRY M. STONE AND CLARK NOBLE, PARTNERS, DOING BUSINESS UNDER THE NAME OF STONE & NOBLE,
Defendants in Error.

ERROR TO THE COURT OF APPEALS OF CRAWFORD COUNTY, STATE OF OHIO.

BRIEF FOR ERIE RAILROAD COMPANY, PLAINTIFF IN ERROR.

C. E. McBRIDE,
N. M. WOLFE,
WILLIAM E. CUSHING,
Attorneys for Erie Railroad Company, Plaintiff in Error.

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(24,933)

In the Supreme Court of the United States

October Term, 1916.

No. 254.

ERIE [illegible]OAD COMPANY,
[illegible]f in Error,

vs.

HENRY M. STONE AND CLARK NOBLE, PARTNERS, DOING BUSINESS UNDER THE NAME OF STONE & NOBLE,
Defendants in Error.

ERROR TO THE COURT OF APPEALS OF CRAWFORD COUNTY, STATE OF OHIO.

BRIEF FOR ERIE RAILROAD COMPANY, PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

Erie Railroad Company, defendant below, having exhausted its remedies in the State Courts, brings its case here, pursuant to Sec. 237 of the Judicial Code, on writ of error to the Court of Appeals of Crawford County, Ohio, on the ground that the State Courts erroneously denied it a right claimed by it under the Interstate Commerce Act and the acts amendatory thereof and supplementary thereto. The action below was a civil action at law, brought against it by H. M. Stone and Clark Noble, partners as Stone & Noble (defendants in error) in the Common Pleas Court of Crawford County, Ohio, April 13, 1907 (printed record, page 194, top paging—all references to the record herein are to top paging of printed record). The amended petition on which the

case was tried contained (Rec., pp. 34-36) three causes of action, each for the recovery of damages alleged to have been sustained in transit by horses shipped by Stone & Noble for transportation by railroad from St. Mary's, Ohio, a station on the line of The Lake Erie & Western Railroad Company, over its line to Lima, Ohio, and thence via Erie Railroad Company's line to destination. The shipment involved in the first cause of action was intrastate (to Martel, Ohio); but those involved in the second and third causes of action were interstate (to East Buffalo, New York), and were made, respectively, on the 6th and 20th of March, 1907. With regard to each shipment a contract, partly printed and partly written, entitled "Limited Liability Live Stock Contract," was executed in duplicate on the part of The Lake Erie & Western Railroad Company (therein styled "the carrier") and on the part of said shippers, containing the following provision:

> "That no claim for damages which may accrue to the said shipper under this contract shall be allowed or paid by the said carrier, or sued for in any court by the said shipper, unless a claim for such loss or damage shall be made in writing, verified by the affidavit of the said shipper or his agent, and delivered to the Erie Ry. agent of said carrier at his office in East Buffalo, N. Y., within five days from the time said stock is removed from said car or cars, and that if any loss or damage occurs upon the line of a connecting carrier, then such carrier shall not be liable unless a claim shall be made in like manner and delivered in like time to some proper officer or agent of the carrier on whose line the loss or injury occurs."

Under the provisions of the schedules then in force and on file with the Interstate Commerce Commission, and under the provisions of said contracts as well, shippers by adopting such contract secured the advantage of an alternative freight rate lower than the rate they would otherwise have had to pay.

At the trial, in February, 1914, the Common Pleas Court, after telling the jury that it was conceded that no written claim, sworn or otherwise, was filed within five days after the shipments respectively reached destination, submitted to the jury the question whether this five-day limitation was reasonable or not, and authorized the jury to return a verdict in favor of Stone & Noble if they should find it unreasonable (Rec., pp. 197-198). The jury gave Stone & Noble a verdict for the lump sum of $1422.23 (Rec., p. 33)—a sum far in excess of the amount claimed on the intrastate cause of action—and judgment was rendered thereon in their favor (Rec. p. 33), and that judgment was affirmed by the Court of Appeals of Crawford County, the highest State Court in which a decision in the suit could be had.

The contention of Erie Railroad Company is that a federal right claimed by it, was denied to it in thus permitting the jury to disregard, with reference to the interstate causes of action, the five-day notice provision.

To show in more detail that the record presents this question, and just how it presents it, a more amplified statement of the facts here follows:

The amended petition (Rec. pp. 34-36) named The Lake Erie & Western Railroad Company as an additional defendant, but at a trial four years earlier than the one now under consideration, that company secured a directed verdict in its favor and judgment thereon, which remained final, so that it then ceased to be a party to the litigation (Rec. p. 20).

The amended petition, after alleging that the line operated by The Lake Erie & Western, extended from St. Mary's to Lima, and the line operated by the Erie from Lima to destination, charged that each shipment was delivered to and received by "defendants" at St. Mary's for transportation to destination, and was injured in transit by negligence of "defendants."

The Erie's original answer (Rec. pp. 37-39) by its "Third Defense" alleged:

> "For their defense to first, second and third causes of action respectively this defendant says that if horses were delivered and received for carriage as therein alleged, the same was done under and pursuant to the terms of a written contract, as set forth in the second defense, all allegations whereof with reference thereto are here adopted as though herein repeated at length, and that no claim for loss or damage, in writing or otherwise, verified by affidavit or not, was made or delivered to any agent or officer of this defendant, at destination or elsewhere, within five days from the time the horses were removed from the car, or at any other time."

Among the allegations of the Second Defense thus incorporated in the Third Defense by reference and adoption, as permitted by the provision of Ohio General Code Sec. 11331 that "statements in one part of a pleading may be incorporated into another by reference to and adoption therein," were the following:

> "Said defendant says with reference to each cause of action respectively, that if horses were delivered and received for carriage, as therein alleged, the same was done under, and pursuant to the terms of, a written contract, entered into between the shipper or shippers, acting personally or through a duly authorized agent, and The Lake Erie & Western Railroad Company, and signed by both (in entering into which contract said Lake Erie & Western Railroad Company was acting for itself, and on behalf of any connecting carrier or carriers) by the terms whereof it was mutually agreed that in consideration of a freight rate, which was the lower of two published tariff rates for such carriage of live stock, and was based upon the express condition that any carrier thereof assumed liability to the extent only of an agreed valuation of not exceeding $100 for each horse, upon which valuation was based such lower tariff rate, and beyond which valuation no such carrier should be liable in any event, whether loss or damage should occur by the negligence of it or its employees, or otherwise, shippers having

the option of making the shipment at a higher rate of freight, according to the official tariffs, classifications and rules of said Lake Erie & Western Railroad Company and such connecting carriers, voluntarily decided to ship under the conditions of such contract at such reduced rate of freight. And that such contract contained the further conditions and provisions that * * * no claim or damages which might accrue to shipper under the contract should be allowed or paid by said Lake Erie & Western Railroad Company or be sued for in any court by shipper, unless a claim for such loss or damage should be made in writing, verified by the affidavit of shipper or his agent, and delivered to this defendant at its office at point of destination within five days from the time such stock should be removed from the car."

Stone & Noble's reply to the Erie's answer, besides a general denial of the allegations of said Second and Third Defenses, alleged (Rec. pp. 39-41) that if such contracts of shipment were signed on behalf of shippers, such signing was unauthorized, and was done without knowledge of the contents, and after loading the horses and paying the freight, and that the contracts lacked consideration, and were void as against public policy. And by supplemental reply (Rec. pp. 41-42) they alleged that the five-day notice requirement was "by said carrier or connecting carrier waived or dispensed with."

Thereafter the Erie by leave of court filed (Rec. p. 32) an amendment to its said Third Defense to the Second and Third causes of action, alleging (Rec. pp. 42-43) as to the shipments involved in those causes of action:—

"That each of said shipments came into this defendant's hands in Ohio, for transportation by and from Ohio to East Buffalo, N. Y., as a common carrier by railroad; that its official tariffs, classifications and rules applicable to such interstate shipment, and in print and in force and open to public inspection prior to and at and during the times of such shipments had been filed with and were at all

such times duly on file with the Interstate Commerce Commission of the United States, pursuant to the Act of Congress of the United States approved February 11th, 1887, and entitled 'An Act to Regulate Commerce' and pursuant to all Acts of Congress amendatory thereof; and provided that live stock shipped under written contracts of the nature of those under which the shipments referred to in said second and third causes of action, were made, as in said second defense alleged, would be carried at specified reduced rates, otherwise at specified higher rates; that if shipper should not give notice of his election not to accept such reduced rate, it would be understood that he desired the property carried subject to the conditions and provisions of such contracts, in order to secure such reduced rates. That such shipments were in fact made at such reduced rate. That by virtue of the foregoing and of said Acts of Congress, the provisions of said contracts are each and all binding on plaintiffs, and under the terms of said contracts plaintiffs are not entitled to recover herein on their second or their third cause of action."

Stone & Noble demurred to this amendment, and that demurrer was heard and overruled, and leave given them to file reply thereto, which, however, they did not do (Rec. p. 32).

Ohio General Code Sec. 11329 provides that "every material allegation of new matter in an answer, not controverted by the reply, shall be taken as true."

At the trial the carrier's duplicate originals of the contracts of shipment were put in evidence (Rec. p. 156), and photographic copies of them are between pages 200 and 201 of the printed record. Those relating to the interstate shipments bear date March 6, 1907, and March 20, 1907, respectively, and are marked respectively "Deft.'s Ex. B" and "Defendant's Exhibit C"; each was made out by suitably filling the blanks in a printed form which contained the following matter:

"LIMITED LIABILITY LIVE STOCK CONTRACT FOR THE LAKE ERIE & WESTERN RAILROAD COMPANY,

* * * *

No..... .....Station, ...190

This Agreement, made this.....day of .....190.., by and between the Lake Erie & Western Railroad Company, hereinafter called the Carrier, and..... hereinafter called the Shipper,

"WITNESSETH, That the said Shipper has delivered to the said Carrier Live Stock of the kind and number, and consigned and destined by said Shipper, as follows: .....for transportation from .....to destination, if on the said carrier's line of railroad, otherwise to the place where said Live Stock is to be received by the connecting carriers for transportation to or toward destination, and that the same has been received by said carrier for itself and on behalf of connecting carriers, for transportation, subject to the official tariffs, classifications and rules of the said company, and UPON THE FOLLOWING TERMS AND CONDITIONS, WHICH ARE ADMITTED AND ACCEPTED BY THE SAID SHIPPER AS JUST AND REASONABLE, viz.:

"That said shipper, or the consignee, is to pay freight thereon to the said Carrier at the rate of ..... per..... from..... to..... which is the lower published tariff rate based upon the express condition that the carrier assumes liability on the said Live Stock to the extent only of the following AGREED VALUATION, UPON WHICH VALUATION IS BASED THE RATE CHARGED FOR THE TRANSPORTATION OF THE SAID ANIMALS, and beyond which valuation neither the said carrier nor any connecting carrier shall be liable in any event, whether the loss or damage occur through the negligence of the said carrier or connecting carriers or their employees or otherwise:

"If Horses or Mules—not exceeding one hundred dollars each.

* * *

"That no claim for damages which may acccrue to the said shipper under this contract shall be allowed or paid by the said carrier, or sued for in any court by the said shipper, unless a claim for such loss or damage shall be made in writing, verified by the affidavit of the said shipper or his agent, and delivered to the.....agent of said carrier at his office in.....within five days from the time said stock is removed from said car or cars; and that if any loss or damage occurs upon the line of a connecting carrier, then such carrier shall not be liable unless a claim shall be made in like manner, and delivered in like time, to some proper officer or agent of the carrier on whose line the loss or injury occurs."

* * *

"And.....do hereby acknowledge that..... had the option of shipping the above described Live Stock at a higher rate of freight according to the official tariffs, classifications and rules of the said carrier and connecting carriers and thereby receiving the security of the liability of the said carrier and connecting railroad and transportation companies as common carriers of the said Live Stock upon their respective roads and lines, but ha.. voluntarily decided to ship the same under this contract at the reduced rate of freight above first mentioned."

The blank spaces in the above five-day notice clause were filled in by writing, so as to make it read, as to each of the interstate shipments, "delivered to the Erie Ry. agent of said carrier at his office in East Buffalo, N. Y., within five days from the time said stock is removed from said car or cars."

Each contract was executed on the part of both parties in duplicate, one duplicate being retained by the Lake Erie & Western, and the other delivered to the person arranging on behalf of shippers for the shipment (Rec. pp. 157, 170). The contract of March 6th was executed on behalf of shippers by plaintiff Stone, in person (Rec. p. 95), and that of March 20th by J. T. Smith, who was shippers' agent or representative for the purpose of making the arrangement for that shipment (Rec. pp. 93,

109). The evidence showed that published schedules of rates, tariffs and classifications, at the time of said shipments in force and on file, and open to inspection at the St. Mary's freight office, fixed a rate of 31½c per cwt. on such carload shipments of horses from St. Mary's to East Buffalo over said route, if made under the terms and conditions of such live stock contracts, and a rate of 20 per cent. higher if made at carrier's liability not so conditioned and limited, the choice between those methods being open to shippers, and these shipments being made at the 31½c rate (Rec. pp. 158-167 and 170-175, and especially pp. 164, 165, 174, 202, 203). At the time of arrival of each of said interstate shipments, plaintiff Stone was at destination and saw each shipment there immediately upon its arrival and unloading, and says that he saw that the horses were gaunt. bruised and lame, and one of them sick (Rec. pp. 58, 59, 66). They were at once taken to the stables of consignee, The Crandall Horse Co. of East Buffalo, a concern engaged in the sale of horses, and shippers' agent for the sale of these horses on commission (Rec. pp. 115, 147 to 150, 176 to 180). There they were sold, Stone remaining and assisting in the sale (Rec. pp. 60, 180, 187). All of the horses in the shipment of March 6th were sold and realized on by the end of the second day after arrival and unloading (Rec. pp. 63, 180). The horses shipped March 20 arrived and were unloaded March 23 (Rec. p. 58); one of them died March 25 (Rec. pp. 153-4); and of the others, about half were sold and realized on by March 26, and all the rest by April 1 (Rec. p. 183). No claim for damages on either shipment was filed (Rec. pp. 63, 69, 187, 188, 197); nor was any complaint made in any form to any carrier with reference to either of them, except that on the second day after the arrival of the shipment of March 20, Stone met the Erie's live stock agent and asked him to go and look at the horses of that shipment as they were badly bruised, which he declined to do (Rec. pp. 191, 192, 63).

At the close of all the testimony the Erie moved the court, separately with regard to each cause of action, to arrest the testimony from the jury and direct a verdict in its favor, which the court declined to do (Rec. p. 195), to which refusal the Erie excepted.

The Court's charge submitted to the jury, besides the question of the amount of damage, only the question whether the five-day notice provision of the signed contracts of shipment was reasonable or not; saying (Rec. pp. 197-8):—

> "It is conceded in the evidence that no written claim, sworn to or otherwise, was filed with the agent of the defendant company at Martel or Buffalo within the five days after the arrival of the horses at these places, respectively, which, I say to you, is a defense in this action, unless from all the facts and circumstances presented as to each shipment the same could not reasonably be done within that time. I mean by this, if, after the arrival of the horses at their destination in any case and the extent of the injuries to or loss of any horse, or horses, was discovered, and there remained a reasonable time within the five days to make up and present to the agent at the station of destination of such shipment a written claim, sworn to, of their damages by reason of such injury and loss, they were bound to do so in order to protect their claim. To put it another way: If the extent of the injuries to the horses, or the loss of any horse, could not reasonably be discovered within the five days, or if the same was discovered within the five days and the time remaining was so short that by reasonable effort the plaintiffs could not make up their claim, have it sworn to and present it to the agent of the defendant company at the place of destination in any case, then that would be unreasonable and would excuse them from the filing of such claim. The question presented to you, therefore, as to each shipment is: Was this five-day limit reasonable or unreasonable as applied to the facts and circumstances as to that shipment?
>
> "If, as to any shipment in question here, you conclude that this five days' limit was reasonable under the facts and circumstances of that shipment

as developed by the evidence adduced here, then it will be your duty to find for the defendant company as to the claim for damages made on account of such shipment.

"If you should conclude that this five day limit was reasonable, as explained, as to each and every one of said shipments, then, of course, it will be your duty to return a verdict for the defendant company on all three causes of action.

"But, if as to any shipment in question here, you conclude that this five day limit was unreasonable, under the facts and circumstances of that shipment as developed by the evidence adduced here, then it will be your duty to find for the plaintiffs on their claim for damages made on account of any such shipment, or shipments."

The Erie excepted (Rec. p. 199) "to the charge as a whole and to each and every part thereof"; a form of exception which under Ohio General Code, Sec. 11561, "shall apply to all errors of law which exist in such charge as are material and prejudicial to the substantial rights of the party excepting," and is a sufficient exception to each such error (*State vs. McCoy*, 88 O. S., 447, 454).

The amounts sued for by Stone & Noble were, by the first cause of action (the intrastate one) $315 plus interest from October 12, 1906; by the second cause of action $350 plus interest from March 17, 1907; and by the third $750 plus interest from March 23, 1907 (Rec. pp. 34-36). The verdict in their favor, rendered February 18, 1914, was in the lump sum of $1422.23; and judgment was rendered thereon (Rec. p. 33). The $315 claimed in the first or intrastate cause of action, plus interest at the statutory rate of 6% per annum (as per Gen. Code, Sec. 8305) would come to only $453.81, so that at least more than two-thirds of the judgment, and perhaps all of it, was awarded on account of the interstate shipments. Error in the charge as to the interstate shipments would therefore vitiate the entire verdict and judgment, and require

them to be set aside and reversed, on the principle of *L. S. & M. S. Ry. Co. vs. Prentice*, 147 U. S., 101, where after finding a charge wrong for authorizing a jury to give punitive damages, it was said:

> "For this error, as we cannot know how much of the verdict was intended by the jury as a compensation for the plaintiff's injury and how much by way of punishing the corporation for an intent in which it had no part, the judgment must be reversed."

The Erie took the case to the Court of Appeals of Crawford County on error, and that court affirmed the judgment below, without opinion (Rec. pp. 44, 49).

Sec. 6 of Article IV of the Ohio Constitution as amended in 1912, makes judgments of the Courts of Appeals final, unless questions are involved arising "under the Constitution of the United States," (or arising in other ways immaterial here), or unless the Supreme Court directs the record to be certified to itself for review as involving "questions of public or of great general interest." The Erie undertook in both of these ways to have the case reviewed by the Ohio Supreme Court, but that court denied the Erie's application for a direction that the record should be certified up as involving questions of public or general interest (Rec. pp. 45, 48), and on motion of Stone & Noble ordered stricken from the files the Erie's petition in error, predicated on the ground that a question arising under the Constitution of the United States was involved (Rec. pp. 45, 48). Both these rulings of the Ohio Supreme Court were without opinion (Rec. p. 48). Thereupon the Erie brought the case here by writ of error to the Court of Appeals of Crawford County, in the custody of which court the record was (Rec. pp. 1-9), on the ground that by said rulings of the state courts it was erroneously denied a right claimed by it under the interstate commerce legislation of Congress.

SPECIFICATIONS OF ERROR.

The Court of Appeals erred in affirming the judgment recovered by Stone & Noble against the Erie in the Court of Common Pleas:

1. Because the Common Pleas Court erred in refusing the Erie's request at the close of the testimony, that as to the second cause of action the evidence be arrested from the jury and a verdict directed in the Erie's favor, which refusal was then and there excepted to by the Erie (Rec. p. 195):

2. And because the Common Pleas Court erred in refusing the Erie's request at the close of the testimony, that as to the third cause of action the evidence be arrested from the jury and a verdict directed in the Erie's favor; which refusal was then and there excepted to by the Erie (Rec. p. 195):

3. And because the Common Pleas Court erred in charging the jury with reference to the second cause of action, and also with reference to the third cause of action, as follows (Rec. pp. 197, 198):

> "It is conceded in the evidence that no written claim, sworn to or otherwise, was filed with the agent of the defendant company at Martel or Buffalo within the five days after the arrival of the horses at these places, respectively, which, I say to you is a defense in this action, unless from all the facts and circumstances presented as to each shipment the same could not reasonably be done within that time. * * * To put it another way: If the extent of the injuries to the horses, or the loss of any horse, could not reasonably be discovered within the five days, or if the same was discovered within the five days and the time remaining was so short that by reasonable effort the plaintiffs could not make up their claim, have it sworn to and present it to the agent of the defendant company at the place of destination in any case, then that would be unreasonable and would excuse them from the filing of such claim. The question presented to you, therefore, as to each ship-

ment is: Was this five day limit reasonable or unreasonable as applied to the facts and circumstances as to that shipment? * * * But, if as to any shipment in question here, you conclude that this five day limit was unreasonable, under the facts and circumstances of that shipment as developed by the evidence adduced here, then it will be your duty to find for the plaintiffs on their claim for damages made on account of any such shipment, or shipments."

4. And because, by reason of the errors above specified it was error for the jury to render the verdict it did in favor of Stone & Noble (Rec. p. 33) and for the Common Pleas Court to render judgment in their favor upon said verdict (as it did) (Rec. p. 33).

Each and all the errors above specified denied to the Erie the Federal right asserted in its answer and amendment to answer, and established by the evidence, to have Stone & Noble's failure to comply with the five day notice provision held to constitute a complete defense to the second cause of action and also to the third cause of action, and to entitle the Erie to a directed verdict, and to judgment thereon, in its favor on each of said two causes of action.

ARGUMENT.

I.

THE RECORD DULY PRESENTS A FEDERAL QUESTION.

The verdict, and the judgment rendered thereon, cannot stand if the said rulings of the Common Pleas Court with regard to the validity of the provisions of filed schedules, and of the contracts made pursuant thereto for the interstate shipments involved in the second and third causes of action, were wrong.

This is of course a Federal question.

Southern Railway vs. Prescott, 240 U. S., 632, 636.
Cincinnati & Tex. Pac. Ry. vs. Rankin, 241 U. S., 319, 326.
Northern Pacific Ry. vs. Wall, 241 U. S., 87.

By executing and accepting the contracts of shipment, containing limitations of which the five day notice clause was one, shippers secured the benefit of a freight rate lower than the alternative one, open to them, which they would otherwise have had to pay. The contracts, in evidence, expressly say so; and so do the rate schedules, duly published and filed and in force at the time, and in evidence. Even had no proof of the nature and terms, or of the filing, of those schedules been made, and even had Stone & Noble put in issue by reply (as they did not), the allegations of the Erie's Amendment to Answer with reference to the contents and to the filing of the schedules. those recitations of the contracts would of themselves constitute sufficient *prima facie* evidence that schedules so providing, were in force and duly on file with the Interstate Commerce Commission. This is settled by *Cincinnati & Tex. Pac. Ry. vs. Rankin*,

241 U. S., 319. There, as here, a limitation clause in a contract for interstate transportation (in that case a limitation on the amount of recovery) though set up by the carrier in defense, was held in the State Court to be unreasonable and therefore void. There, as here, the contract recited that shipper had a choice of rates, and by accepting such contract availed himself of the lower rate. But there the allegations of that defendant's plea that the contract was in accordance with its rate schedules and that those schedules had been filed with the Commission, were put in issue and no evidence whatever was offered in their support, except so far as the putting of the contract itself into the evidence might operate as such. Yet this Court reversed the judgment rendered below against the carrier; the opinion (by Mr. Justice McReynolds) saying (pp. 326-328):

> "The shipment being interstate, rights and liabilities of the parties depend upon Acts of Congress, the bill of lading, and common law rules as accepted and applied in Federal tribunals. Cleveland & St. Louis Ry. vs. Dettlebach, 239 U. S., 588; Southern Express Co. vs. Byers, 240 U. S., 612, and cases cited; Southern Ry. vs. Prescott, 240 U. S., 632.
>
> "We cannot assent to the theory apparently adopted below that the interpretation and effect of a bill of lading issued by a railroad in connection with an interstate shipment present no Federal question unless there is affirmative proof showing actual compliance with the Interstate Commerce Act. It cannot be assumed, merely because the contrary has not been established by proof, that an interstate carrier is conducting its affairs in violation of law. Such a carrier must comply with strict requirements of the Federal statutes or become subject to heavy penalties, and in respect of transactions in the ordinary course of business it is entitled to the presumption of right conduct. The law 'presumes that every man, in his private and official character, does his duty, until the contrary is proved; it will presume that all things are rightly done, unless the circumstances of the case overturn this presumption,

according to the maxim, *omnia presumuntur rite et solemniter esse acta, donec probetur contrarium.*' * * *

"Under our former opinions the settled doctrine is that where alternate rates fairly based upon valuation are offered, a railroad may limit its liability by special contract. Pierce Co. vs. Wells, Fargo & Co., 236 U. S., 278, 283.

"The essential choice of rates must be made to appear before a carrier can successfully claim the benefit of such a limitation and relief from full liability. And as no interstate rates are lawful unless duly filed with the Commission, it may become necessary for the carrier to prove its schedules in order to make out the requisite choice. But where a bill of lading, signed by both parties, recites that lawful alternate rates based on special values were offered, such recitals constitute admissions by the shipper and sufficient *prima facie* evidence of choice. If in such a case the shipper wishes to contradict his own admissions, the burden of proof is upon him.

"The bill of lading in question is plainly entitled 'Contract for Limited Liability in the Transportation of Live Stock at Reduced Rates' and contains the conspicuous provisions concerning published rates, tariff regulations, choice offered the shipper and limit upon the carrier's liability, etc., above set out. In view of these recitals and admissions, the limitation of liability must be treated as *prima facie* valid, and, consequently, the trial court erred in holding it void as a matter of law and permitting a recovery for full value of the animals."

II

AS THE SCHEDULES ON FILE WITH THE INTERSTATE COMMERCE COMMISSION PROVIDED THAT TO SECURE THE RATE AT WHICH THESE INTERSTATE SHIPMENTS WERE MADE, THEY MUST BE MADE SUBJECT TO THE FIVE DAY NOTICE CLAUSE, THE REASONABLENESS OF THAT CLAUSE IS NOT OPEN TO ATTACK IN COURT, OR OTHERWISE THAN IN A DIRECT PROCEEDING BEFORE THE INTERSTATE COMMERCE COMMISSION.

The Interstate Commerce Act as amended and supplemented by the Elkins Act of 1903 and the Hepburn Act of 1906, embodies two distinct lines of requirement: one forbidding unreasonable or discriminatory charges, practices or regulations, and the other requiring schedules to be filed with the Commission and forbidding any departure therefrom. The question therefore immediately arose, how to reconcile the two in case of a complaint that something prescribed in such a schedule is unreasonable or discriminatory. This Court has by a long series of decisions interpreted the acts as necessarily meaning that the Commission has exclusive jurisdiction in the first instance to entertain and pass on such a question, and that independently of prior action by the Commission, a schedule provision cannot be attacked or disregarded for either reason in any proceeding before a court. Otherwise one court or jury might hold it reasonable, and another might hold it unreasonable (or the Commission and the courts might disagree), and thus destroy the unanimity which it is the object of the Interstate Commerce Act to bring about; and give instead to such shippers as should succeed in having the question resolved in their favor, an advantage over those less fortu-

nate, and thereby produce the very discriminations forbidden by Sec. 2 of the Hepburn Act, which requires the filed tariffs to state all "rules and regulations which in any wise affect the value of the service rendered to the shipper" and declares it unlawful to "extend to any person any privileges or facilities in the transportation of property except such as are specified in such tariffs," or "to give or receive any discrimination whereby property shall be transported at a less rate than that named in the tariffs or whereby any other advantage is given or discrimination practiced."

See *Tex. & Pac. Ry. vs. Abilene Cotton Oil Co.*, 204 U. S., 426, 441 (opinion by Mr. Chief Justice White):

> "The existence of such a power in the courts, independent of prior action by the Commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination, and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted. Indeed no reason can be perceived for the enactment of the provision endowing the administrative tribunal, which the act created, with power, on due proof, not only to award reparation to a particular shipper, but to command the carrier to desist from violation of the act in the future, thus compelling the alteration of the old or the filing of a new schedule, conformably to the action of the Commission, if the power was left in courts to grant relief on complaint of any shipper, upon the theory that the established rate could be disregarded and be treated as unreasonable, without reference to previous action by the Commission in the premises. This must be, because, if the power existed in both courts and the Commission to originally hear complaints on this subject, there might be a divergence between the action of the Commission and the decision of a court."

Also *Robinson vs. B. & O. Ry. Co.*, 222 U. S., 506, where a shipper of coal which he loaded into cars from wagons, sued for damages because the schedule charge made and collected from him for coal so loaded was fifty cents more per ton than if loaded from a tipple, which he claimed to be unjust discrimination. The opinion by Mr. Justice Van Devanter, after citing the Abilene case referred to above, said (p. 511):

> "It is true, as was urged in argument, that in that case the complaint against the established rate was that it was unreasonable, while here the complaint is that the rate was unjustly discriminatory. But the distinction is not material. The power of the Commission over the two complaints is the same, one is as likely to become the subject of diverging opinions and conflicting decisions as is the other, and if a court, acting originally upon either, were to sustain it and award reparation, the confusing anomaly would be presented of a rate being adjudged to be violative of the prescribed standards and yet continuing to be the legal rate, obligatory upon both carrier and shipper."

Also *Penna. R. R. Co. vs. International Coal Co.*, 230 U. S., 184, 197 (opinion by Mr. Justice Lamar):

> "The tariff, so long as it was of force, was, in this respect, to be treated as though it had been a statute, binding as such upon railroad and shipper alike. If, as a fact, the rates were unreasonable the shipper was nevertheless bound to pay and the carrier to retain what had been paid, leaving, however, to the former the right to apply to the Commission for reparation."

Also *Mitchell Coal Co. vs. Penna. R. R. Co.*, 230 U. S., 247, 257 (opinion by Mr. Justice Lamar):

> "The claim that this conclusion nullifies Sec. 9 is concretely answered by the fact that the court has just decided to the contrary in Pennsylvania R. R. vs. International Coal Company. There the carrier insisted that a suit for damages, occasioned by rebating, could not be maintained without preliminary

action by the Commission. This contention was overruled, and it was held that, for doing an act prohibited by the statute, the injured party might sue the carrier without previous action by the Commission, because the courts could apply the law prohibiting a departure from the tariff to the facts of the case. But where the suit is based upon unreasonable charges *or unreasonable practices there is no law fixing what is unreasonable and therefore prohibited. In such cases the whole scope of the statute shows that it was intended that the Commission and not the courts should pass upon that administrative question.*"

Also *Great Northern Ry. vs. O'Connor*, 232 U. S., 508, 515 (opinion by Mr. Justice Lamar):

"Under the decisions in Kansas Southern Ry. vs. Carl, 227 U. S., 639, 655; Missouri, Kans. & Tex. Ry. vs. Harriman, 227 U. S., 657, it was not necessary to offer evidence to sustain the reasonableness of rates, classification, *or other terms* in the tariff filed with the Commission. The shipper had the right, by appropriate proceedings, to attack the rate or the classification and if either or both were held to be unreasonable could secure appropriate relief either by Reparation Order, or by suit in court, after such finding of unreasonableness. But so long as the tariff rate, based on value, remained operative, it was binding upon the shipper and carrier alike and was to be enforced by the courts in fixing the rights and liabilities of the parties."

Also *Boston & Maine R. R. vs. Hooker*, 233 U. S., 97, a suit for loss of interstate baggage worth more than $100. Defense, that under the duly filed schedules baggage worth not over $100 would be checked free for a ticket holder, but no liability for exceeding $100 would be assumed unless the owner should declare the excess valuation and pay a corresponding charge. The passenger had no actual knowledge of these requirements, and nothing evidencing them was signed by her, or given or offered to her. The opinion, by Mr. Justice Hughes, says (p. 110):

"Since the decision in the Hughes Case the Hepburn Act of June 29, 1906, c. 3591, 34 Stat. 584, has been passed, and this court has held that by virtue of that act (particularly Sec. 20, the Carmack Amendment) the subject of interstate transportation of property has been regulated by Federal law to the exclusion of the power of the States to control in such respect by their own policy or legislation. In this connection we may refer to the cases of Adams Express Co. v. Croninger, 226 U. S. 491; Wells, Fargo & Co. vs. Neiman-Marcus Co., 227 U. S. 469; Kansas City Southern Ry. Co. vs. Carl, 227 U. S. 639; Missouri, Kansas & Texas Ry. Co. vs. Harriman, 227 U. S. 657." * * *

(P. 112.) "Before these cases were decided this court had held that the effect of filing schedules of rates with the Interstate Commerce Commission was to make the published rates binding upon shipper and carrier alike, thus making effectual the purpose of the act to have but one rate, open to all alike and from which there could be no departure." * * * "This principle it will be perceived was fully recognized in the series of cases decided since the passage of the Hepburn Act, beginning with the case of Adams Express Co. vs. Croninger, supra. It is true that the Carmack Amendment requires a receipt or bill of lading to be issued concerning shipments of property in interstate commerce and that in the cases construing that amendment a bill of lading was issued, and according to the circumstances of the case the bill of lading and its effect are discussed in each of these, but the effect of filing the schedule is not lost sight of and the doctrine of the previous cases as to the purpose of filing and the necessity of adherence to such schedule is uniformly recognized.' * * *

(P. 113.) "It follows therefore, from the previous decisions in this court, that if it be found that the limitation of liability for baggage is required to be filed in the carrier's tariffs, the plaintiff was bound by such limitation. Having the notice which follows from the filed and published regulations, as required by the statute and the order of the Interstate Commerce Commission, she might have declared the value of her luggage, paid the excess tariff rate and thus secured the liability of the carrier to

the full amount of the value of her baggage, or she might, for the purpose of transportation, have valued it at $100 and received free transportation and liability to that extent only, or, as she did, she might have made no valuation of her baggage, in which event the rate and the corresponding liability would have automatically attached." * * *

(P. 121.) "If the charges filed were unreasonable, the only attack that could be made upon such regulation would be by proceedings contesting their reasonableness before the Interstate Commerce Commission. While they were in force they were equally binding upon the railroad company and all passengers whose baggage was transported by carriers in interstate commerce. This being the fact, we think the limitation of liability to $100 fixed the amount which the plaintiff could recover in this case, and there was error in affirming the recovery for the full value of the baggage, in the absence of a declaration of such value and payment of the additional amount required to secure liability in the greater sum."

Also *Pierce Co. vs. Wells, Fargo & Co.*, 236 U. S. 278, 285 (opinion by Mr. Justice Day):

"But it is said, and this fact was the basis of the dissenting opinion in the Circuit Court of Appeals, that there was no valuation at all in this case, and that the disproportion between the actual value of the automobiles shipped,—about $15,000,—and $50 demonstrates this fact, and it is insisted that what was done was merely an arbitrary and unreasonable limitation in the guise of valuation. This argument overlooks the fact that the legality of the contract does not depend upon a valuation which shall have a relation to the actual worth of the property. None such was attempted in the Neiman-Marcus Case, the Croninger Case, or the Hooker Case. But the contract embodied in the receipt was sustained in the Express Company Cases, because of the acceptance of the same by the parties as the basis of shipment, and by force of the statute as to the filed tariff and the requirement of the shipper to take notice of its terms and to be bound thereby. In each of those cases the filed tariff showed an oppor-

tunity to the shipper to have a recovery in a greater value than was declared, thus making it optional with the shipper to ship at the lower rate and not to avail himself of the right to greater recovery upon paying the higher rate named in the tariff. As the cases cited have held, so long as the tariff rate remains operative, the alternative rates based on value are deemed to be in force and controlling of the rights of the parties. Great Northern Ry. vs. O'Connor, 232 U. S. 508; Boston & Maine R. R. vs. Hooker, 233 U. S. 97, 121.

"If the rates were unreasonable it is for the Commission to correct them upon proper proceedings. If this were not so, the Interstate Commerce Act would fail to make effectual one of its prime objects, the prevention of discrimination among shippers."

Also *Louis & Nash. R. R. vs. Maxwell,* 237 U. S. 94, 97 (opinion by Mr. Justice Hughes):

"Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination."

Also *Southern Ry. vs. Prescott,* 240 U. S. 632, 638-9 (opinion by Mr. Justice Hughes):

"It is also clear that with respect to the service governed by the Federal statute the parties were not at liberty to alter the terms of the service as fixed by the filed regulations. This has repeatedly been held with respect to rates (Tex. & Pac. Ry. vs. Mugg, 202 U. S. 242; Kansas Southern Rwy. vs. Carl, 227 U. S. 639, 652; Boston & Maine R. R. vs. Hooker, 233 U. S. 97, 112; Louis. & Nash. R. R. vs.

Maxwell, 237 U. S. 94), and *the established principle applies equally to any stipulation attempting to alter the provisions as fixed by the published rules relating to any of the services within the purview of the Act.* Chicago & Alton R. R. vs. Kirby, 225 U. S. 155, 166; Atchison &c. Ry. vs. Robinson, 233 U. S. 173, 181. This is the plain purpose of the statute in order to shut the door to all contrivances in violation of its provisions against preferences and discriminations. No carrier may extend 'any privileges or facilities' save as these have been duly specified. And as the terminal services incident to an interstate shipment are within the Federal Act, and the conditions of liability while the goods are retained after notice of arrival are stipulated in the bill of lading under the filed regulations, *the conditions thus fixed are controlling* and the parties cannot substitute therefor a special agreement." * * *

"The transaction at most could not be deemed to accomplish more than if the parties had agreed that until such delivery the goods should be held under a special contract—in lieu of the prescribed conditions, and this they could not effect without violating the Act which governed the shipment. It could not be said, for example, that while under the filed regulations the Railway Company was to make a 'reasonable charge for storage' pending delivery that it could agree with a particular shipper, or consignee, to hold gratuitously; nor could it alter the terms of its responsibility while the goods remained undelivered. The actual service in holding the goods continued and we must look to the bill of lading to determine the legal obligation attached to the service."

The requirement of the filed schedules involved in the case at bar being, that to obtain the rate at which these interstate shipments were made they must be made subject to the five day notice clause, it would have been a prohibited discrimination and would have given Stone & Noble a prohibited advantage, for the carrier to undertake to ignore, eliminate or waive that clause in favor of Stone & Noble; and the same result was produced by allowing the jury to disregard it.

III.

AS MATTER OF LAW, THE FIVE DAY NOTICE PROVISION OF THE SCHEDULES AND OF THE CONTRACTS WAS REASONABLE, AND FOR THIS REASON ALSO IT WAS ERROR TO ALLOW THE JURY TO FIND IT UNREASONABLE AND VOID.

Sec. 20 of the Interstate Commerce Act, as amended by the socalled Carmack Amendment contained in the Hepburn Act of 1906, in force at the time of these shipments, does not prohibit limitation clauses, and this court has repeatedly sustained them.

See *Mo., Kans. & Tex. Ry. vs. Harriman*, 227 U. S. 657, 671-3 (opinion by Mr. Justice Lurton):

> "The court below held that the stipulation in the shipping contract that no suit shall be brought after the lapse of ninety days from the happening of any loss or damage, 'any statute or limitation to the contrary notwithstanding,' was void.
>
> "It is conceded that there are statutes in Missouri, the State of the making of the contract, and the State in which the loss and damage occurred, and in Texas, the State of the forum, which declare contracts invalid which require the bringing of an action for a carrier's liability in less than the statutory period, and that this action, though started after the lapse of the time fixed by the contract was brought within the statutory period of both States.
>
> "The liability sought to be enforced is the 'liability' of an interstate carrier for loss or damage under an interstate contract of shipment declared by the Carmack Amendment of the Hepburn Act of June 29, 1906. The validity of any stipulation in such a contract which involves the construction of the statute, and the validity of a limitation upon the liability thereby imposed, is a Federal question to be determined under the general common law, and, as such, is withdrawn from the field of state law or leg-

islation. Adams Express Co. vs Croninger, 226 U. S. 491; Michigan Central Railroad vs. Vreeland, ante, p. 59. The liability imposed by the statute is the liability imposed by the common law upon a common carrier, and may be limited or qualified by special contract with the shipper, provided the limitation or qualification be just and reasonable, and does not exempt from loss or responsibility due to negligence. * * *

"The policy of statutes of limitation is to encourage promptness in the bringing of actions, that the parties shall not suffer by loss of evidence from death or disappearance of witnesses, destruction of documents or failure of memory. But there is nothing in the policy or object of such statutes which forbids the parties to an agreement to provide a shorter period, provided the time is not unreasonably short. *That is a question of law for the determination of the court.* Such stipulations have been sustained in insurance policies. Riddlesbarger vs. Hartford Insurance Co., 7 Wall. 386. A stipulation that an express company should not be held liable unless claim was made within ninety days after a loss was held good in Express Company vs. Caldwell, 21 Wall. 264. Such limitations in bills of lading are very customary and have been upheld in a multitude of cases. * * *

"The provision requiring suit to be brought within ninety days is not unreasonable."

Also *Ga. Fla. & Ala. Ry. vs. Blish Milling Co.* 241 U. S. 190: which was an action against the final carrier for alleged misdelivery and conversion. The bill of lading issued by the initial carrier contained a four months' notice clause. The opinion, by Mr. Justice Hughes, says (pp. 195-7):

"When the goods have been misdelivered there is as clearly a 'failure to make delivery' as when the goods have been lost or destroyed; and it is quite as competent in the one case as in the other for the parties to agree upon reasonable notice of the claim as a condition of liability. It may be urged that the carrier is bound to know whether it has delivered to

the right person or according to instructions. This argument, however, even with respect to the particular carrier which makes a misdelivery, loses sight of the practical object in view. In fact, the transactions of a railroad company are multitudinous and are carried on through numerous employees of various grades. Ordinarily the managing officers, and those responsible for the settlement and contest of claims, would be without actual knowledge of the facts of a particular transaction. The purpose of the stipulation is not to escape liability but to facilitate prompt investigation. And, to this end, it is a precaution of obvious wisdom, and in no respect repugnant to public policy, that the carrier by its contracts should require reasonable notice of all claims against it even with respect to its own operations.

"*There is, however, a further and controlling consideration. We are dealing with a clause in a bill of lading issued by the initial carrier. The statute casts upon the initial carrier responsibility with respect to the entire transportation.* The aim was to establish unity of responsibility (Atlantic Coast Line vs. Riverside Mills, 219 U. S. 186, 199-203; N. Y., P. & N. R. R. vs. Peninsula Produce Exchange, 240 U. S. 34, 38), and the words of the statute are comprehensive enough to embrace responsibility for all losses resulting from any failure to discharge a carrier's duty as to any part of the agreed transportation which, as defined in the Federal Act, includes delivery. It is not to be doubted that if, in the case of an interstate shipment under a through bill of lading, the terminal carrier makes a misdelivery, the initial carrier is liable; and when it inserts in its bill of lading a provision requiring reasonable notice of claims 'in case of failure to make delivery' the fair meaning of the stipulation is that it includes all cases of such failure, as well those due to misdelivery as those due to the loss of the goods. *But the provision in question is not to be construed in one way with respect to the initial carrier and in another with respect to the connecting or terminal carrier.* As we have said, the latter takes the goods under the bill of lading issued by the initial carrier, and its obligations are measured by its terms (Kansas Southern Ry. vs. Carl, supra; Southern Railway vs. Prescott, supra); and if the clause must be

deemed to cover a case of misdelivery when the action is brought against the initial carrier, it must equally have that effect in the case of the terminal carrier which in the contemplation of the parties was to make the delivery. The clause gave abundant opportunity for presenting claims and we regard it as both applicable and valid.

"In this view, it necessarily follows that the effect of the stipulation could not be escaped by the mere form of the action. The action is in trover, but as the state court said, 'if we look beyond its technical denomination, the scope and effect of the action is nothing more than that of an action for damages against the delivering carrier.' 15 Ga. App., p. 147. It is urged, however, that the carrier in making the misdelivery converted the flour and thus abandoned the contract. But *the parties could not waive the terms of the contract under which the shipment was made pursuant to the Federal Act; nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to that conduct and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations.* A different view would antagonize the plain policy of the Act and open the door to the very abuses at which the Act was aimed. Chi. & Alt. R. R. vs. Kirby, 225 U. S. 153, 166; Kansas Southern Ry. vs. Carl, supra; A., T. & S. F. Ry. vs. Robinson, 233 U. S. 173, 181; Southern Ry. vs. Prescott, supra. We are not concerned in the present case with any questions save as to the applicability of the provision, and its validity, and as we find it to be both applicable and valid, effect must be given to it."

Also *Northern Pacific Ry. vs. Wall*, 241 U. S. 87, brought against the initial carrier to recover damages to an interstate shipment of cattle. The shipping contract, and the duly filed schedules, provided that written notice of claim must be given some officer or station agent "of said company" before the cattle were removed from the place of destination, or mingled with other stock; but did not say, as those involved in the suit at

bar do, "that if any loss or damage occurs on the line of a connecting carrier, then such carrier shall not be liable unless a claim shall be made in like manner, and delivered in like time, to some proper officer or agent of the carrier on whose line the loss or injury occurs." There the State Court construed the words "of said company" as not embracing connecting carriers, but as meaning simply the initial carrier, which had no representative at or anywhere near the point of destination, and held the notice clause, thus construed, to be unreasonable and therefore void. But this court reversed the judgment below; the opinion (by Mr. Justice Van Devanter) saying (pp. 92-3):

> "The shipment was to pass over both roads in reaching its destination; the delivery at that place was to be made, as in fact it was, by an officer or station agent of the connecting carrier; and the stipulated notice was to be given before the cattle were removed from the place of destination or mingled with other stock, that is, while it was yet possible from an inspection of them to ascertain whether the claim of injury, if any, was well founded. In these circumstances it seems plain that the stipulation meant and contemplated that the notice might be given at the place of destination to an officer or station agent of the connecting carrier, and that notice to it, in view of its relation to the initial carrier, should operate as notice to the latter. This interpretation treats the stipulation as designed to be fair to both shipper and carrier, permits it to serve a useful purpose and gives due effect to the statute under which it was issued. True, the words 'said company' in the stipulation, if read only in connection with an introductory sentence in the bill of lading, would seem to refer to the initial carrier alone, but when they are read in connection with the statute and other parts of the bill of lading, including the provision that its terms and conditions 'shall inure to the benefit of' any connecting carrier, it is apparent that they embrace the carrier making the delivery as well as the initial carrier, especially as the former is in legal contemplation the agent of the latter."

It is to be noted that the opinions in the three cases last-above cited (the Harriman, Blish and Wall cases) do discuss and affirm the reasonableness of the limitation clauses involved in them respectively, without referring to the principle so repeatedly announced by this court, that the reasonableness of provisions of filed schedules is not open to question in court independently of prior action by the Interstate Commerce Commission. In the disposition made by this court of each of those three cases the same result followed as though that principle had been applied; but they suggest the question whether there be any class of cases—and if so what—in which that principle is not to be treated as applicable and decisive. It may be that a provision of a filed schedule, if on its face so unquestionably in flat violation of a plain statute as not to leave under any state of facts any room for difference of opinion, could be held void in law by courts without prior action by the Commission. As, for instance, a schedule provision plainly discriminatory on its face, as that shippers, if women, should pay a higher freight rate than if men, or if black a higher freight rate than if white; or a schedule provision (since the adoption of the Carmack amendment which charges the initial carrier of goods with responsibility for the entire journey) that the initial carrier should not be liable for damage occurring on the connecting carrier's line. Differences of opinion between courts, or between courts on the one hand and the Commission on the other, as to the invalidity of such provisions as those, are so unimaginable that no diversity of result could be expected, even if courts passed on it in advance of Commission action.

And conversely, it may be that a provision of a filed schedule, if on its face so clearly devoid of unreasonableness when correctly interpreted, that no difference of opinion on that point is imaginable, may be pronounced

reasonable by courts without prior action by the Commission: as for instance the ninety-day limitation on time for bringing suit, pronounced reasonable in this court in the Harriman case (227 U. S. 657); the four-months notice clause pronounced reasonable in this court in the Blish case (241 U. S. 190); and the requirement that written notice of claim for damage to a live stock shipment should be somehow given "before the cattle were removed from the place of destination or mingled with other stock," pronounced reasonable in this court in the Wall case (241 U. S. 87).

In other words, it may be that if a provision of filed schedule is on its face, as matter of law, and in its universal application, unquestionably invalid or unquestionably valid, so that no diversity of conclusion is imaginable, it may be open for courts to so declare it without prior action by the Commission. But if the provision be of such sort that diversity of conclusion in that respect is imaginable, then allowing its validity to be questioned in court in advance of prior action by the Commission, would open the door to the discriminations and non-uniformity forbidden by the interstate commerce legislation, and is precluded—we submit—by the principle, so often announced by this court, that the Commission must act first. And the more chance of difference of opinion there be with regard to the general reasonableness of any particular provision, the greater the need of applying that principle. Still greater must be the need of applying that principle, when the question, instead of being as to the reasonableness in general of such provision, is as to its reasonableness as applied to a particular state of facts, or as applied to particular evidence from which different persons might draw different inferences of fact; and especially where the question becomes so close as to tempt trial courts to treat it as one of fact for the jury rather than of law for the court—as in the case at

bar the trial court actually did; manifesting thereby its own view that from the evidence might be drawn either a conclusion that the provision was reasonable, or a conclusion that it was unreasonable, in its application to this particular case. But such a situation belongs typically to the class of those in which uniformity will be defeated and discrimination and preferences worked, unless the claimants are required, if they wish to attack the reasonableness of the schedule provision, to do so in the first instance before the Commission instead of in court.

But in the case at bar, even if the Hepburn Act did not preclude an attack in court upon the reasonableness of the five-day notice limitation prescribed by the schedules on file with the Commission, the evidence showed no ground for disputing its reasonableness, or for not holding it reasonable as matter of law. Stone & Noble were experienced shippers; for six years their business had consisted of gathering up horses and shipping them in carload lots from various points, and frequently via the Erie, mainly to Buffalo, for immediate sale (Rec. pp. 71-2.) Stone in person accompanied each of the two interstate shipments here involved, part way to Buffalo, and then preceded the shipment thither and waited its arrival there, and saw it and became aware of its condition immediately after its arrival and unloading (Rec. pp. 58, 66, 91), and remained and assisted consignees in its sale (Rec. pp. 60, 187). Both shipments were consigned to the Crandall Horse Company of East Buffalo, a concern engaged in selling horses at its establishment there on commission, at auction or otherwise, and shippers' agent for such sale of these horses (Rec. pp. 115, 176 to 180). Of those shipments, the sale of the one of March 6, arriving on Sunday March 10, was completed by March 12, the second day after arrival (Rec. pp. 66, 180). Yet the charge allowed the jury to find the five-

day notice provision unreasonable as to this shipment; and as the verdict was a lump one, no one can say that it was not in part awarded on account of such shipment. Of the shipment of March 20, which arrived on the afternoon of Saturday March 23 (Rec. p. 58), the horse that died was dead by the morning of Monday March 25 (Rec. pp. 153-4), and of the others, about half were sold by March 26 (the third day after arrival), and all the rest by April 1 (Rec. p. 183); and no witness testified or suggested that it was not entirely practicable to know or estimate within the first five days the amount of damage sustained by that shipment, and to file claim therefor in accordance with the notice clause. We submit that as to that shipment also, a conclusion by either court or jury that the five-day limit was unreasonable and void, was unwarranted; and that for that reason also it was error to allow the jury to draw such a conclusion.

Respectfully submitted,

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